United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,150

J. FRANCIS HARRIS, II,
Appellant,

v.

JAMES E. REID,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellant, the questions presented by this appeal are as follows:

1. Did the trial court have jurisdiction to try this action on January 3rd, 1963, and, if so,

2. Did the trial court err in failing to grant the defendant's motion for a directed verdict.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,150

J. FRANCIS HARRIS, III,
Appellant,

v.

JAMES E. REID,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is a debt action for $4,250, interest and court costs, filed in the United States District Court for the District of Columbia on February 27, 1962, pursuant to § 11-305 et seq. D. C. Code (1961 ed.) and tried by that court for a second time on January 3, 1966. A final judgment was entered for the plaintiff (appellee), which the appellant unsuccessfully moved to set aside and, therefore, from which this appeal is

taken. The jurisdiction of this Court is founded upon the provisions of Title 28 §§ 1291 & 1294, U. S. Code.

STATEMENT OF THE CASE

The appellee filed this action in the United States District Court for the District of Columbia on February 27, 1962, claiming a real estate broker's commission of $4,250, interest and costs. The appellant asserted several defenses to the appellee's claim, counterclaimed against the appellee and, with leave of court, impleaded certain persons, the Kimbles, as co-defendants, cross-claiming against the Kimbles.

The case was tried twice. The first trial ended in a hung jury as to the appellee's claim but resulted in disposition of the counterclaims in favor of the appellee and of the cross-claims in favor of the Kimbles. No appeal was ever taken with respect to any aspect of that trial.

On January 3, 1966, the appellee's claim was tried for a second time with the result that a directed verdict for the plaintiff (appellee) and a judgment in the sum of $3,680 with interest were rendered (JA 14-15) and entered upon the docket accordingly (JA 26). The appellant filed a motion to set the verdict and judgment aside (JA 15-16), which was denied (JA 24), and this appeal followed (JA 25). It is the trial court's actions with respect to the second trial and the resultant verdict and judgment that have led to this appeal; therefore, all future references in this brief to the trial court or the trial will be intended to pertain solely to the second trial, which began on January 3, 1966.

The only relief sought by the appellee was for a real estate broker's commission, interest thereon and costs, and the only demand contained in the complaint is for the specific sum of $4,250, interest and cost (JA 2). That demand, which was never increased, was predicated upon the allegations in the complaint (JA 1-2) that while the appellant

had an ownership interest of record in 2620 P Street, N.W., the appellant signed and gave the appellee a listing card whereof a photocopy was attached to the complaint as an exhibit (JA 3) and which stated:

> "I hereby authorize and give . . . [the appellee] the exclusive right to sell premises known as 2620 "P" St for a period of ___ 30 ___ days.
>
> "Minimum Price to be 85,000.00 Dollars. ***
>
> "I also agree to pay . . .[the appellee] a commission of 5% in case sale is made during said period."

and that the appellant sold and conveyed the property during the thirty-day period to certain persons, the Chutters, without the appellee's consent, notwithstanding the appellee's "exclusive agency to sell . . .[the property]."

The appellant's answer (JA 5) admitted the appellant's ownership of the property and the sale to the Chutters. Of the several defenses asserted by the appellant in the trial court, only two are submitted for consideration on appeal.

One of those defenses, as reflected by that portion of the appellant's answer entitled "Third Defense" (JA 5), is that the appellee, by his conduct, terminated whatever agency relationship may therefore have existed between the appellant and the appellee. The appellee's own testimony showed that at the time the appellant signed the listing card, which was the last of two or more listing cards the appellee received from the appellant or the appellant's co-owner, the appellee presented the appellant with a $70,000 offer for the property signed by the Kimbles and exhibited to the appellant the Kimbles' check for $5,000, the amount called for in the offer as a deposit; that at the time, Mr. Kimble was employed by the appellee as a janitor and the appellee, knowing that the Kimbles were neither interested in purchasing the property nor financially able to do so and that the check was worthless, prevailed upon the

Kimbles to act as straw parties, to sign the offer and to issue their check; that although the Kimbles had been living in the District of Columbia for many years, the appellee, in order to conceal the identity of the Kimbles' principal from the appellant, had the Kimbles identified on the reverse side of the offer as being Whitakers, N. C.; that the appellee intentionally and consistently concealed the identity of the Kimbles' principal from the appellant; and that the appellee signed the Kimbles' names in acceptance of the appellant's $77,500 counter-offer (JA 28-30, 31-32, 33-36, 38-40, 68-71).

Over the appellant's objections, the appellee was permitted to testify that the Kimbles' principal was a Col. J. Thomas and to introduce into evidence a listing card signed "Jay P. Thomas" and pertaining to 3020 O Street, N. W., but containing no reference whatsoever to the appellant's property. The appellee's testimony remained wholly uncorroborated, and the appellee admitted that he had never received anything in writing from Col. Thomas pertaining to the appellant's property, that Col. Thomas never posted any deposit in connection with the appellant's property and that the relations between Col. Thomas and the appellant were strained at the time of the negotiations concerning the Kimble contract. (JA 40-41).

The other defense, offered as an amendment to the pleadings at the beginning of the trial (JA 27-28) is that the appellant sold the property unaided by any agent or broker. The Chutter contract (JA 60-62), written on a contract form specially printed for H. A. Gill & Son, contains the following language in print, except for the underlined portion, which inserted through the use of a typewriter:

> "The seller agrees to pay to H. A. GILL & SON . . . his agent, a commission amounting to *5 percent of sales price* . . ."

Mr. John W. Gill, the owner of H. A. Gill & Son, testified that Mr. Chutter had been a client of H. A. Gill & Son and, more particularly, a

client of H. A. Gill & Son's agent, Mrs. Lillian Helfenstein, since about 1959 and that in December of 1961, Mr. Chutter told H. A. Gill & Son that he was interested in investing in some real estate; and that, consequently, Mrs. Helfenstein showed Mr. Chutter several properties and thereafter, on January 6, 1962, inquired of the appellant, whom Mrs. Helfenstein had previously known, concerning the appellant's property and requested and obtained the appellant's permission, although no written listing, to show the appellant's property to Mr. Chutter, who, on the same day, January 6, 1962, contracted with the appellant to purchase the appellant's property (JA 48-49).

After both sides had rested, the appellant moved for a directed verdict, as did the appellee. The trial court failed to grant the appellant's motion but did grant the appellee's, notwithstanding the trial court's earlier observation that a real estate broker owes a duty to a person who list property with him for sale to reveal to that person the identity of a proposed purchaser and notwithstanding the fact that the appellee had admittedly failed in that duty. In directing a verdict for the appellee, the trial court found that the appellee had been given an "exclusive agency to sell and that not only did the agreement between the appellant and the appellee not exclude a sale by the appellant, unaided by an agent or broker, from the classes of sales in which the appellee would be entitled to a commission but that H. A. Gill & Son had the appellant's property on its list, and the trial court ruled that the language of the Chutter contract estopped the appellant from denying that H. A. Gill & Son was the appellant's agent.

STATUTES INVOLVED

In the opinion of the appellant, the following statutory provisions are involved in this appeal:

§ 11-921(a) D. C. Code (1961 ed., Supp. V, (1966):

"Except in actions or proceedings over which exclusive jurisdiction is conferred by law upon other courts in the District, the United States District Court for the District of Columbia . . . has all the jurisdiction possessed and exercised by it on January 1, 1964 . . ."

§ 11-961(a), Ibid:

". . . the District of Columbia Court of General Sessions has exclusive jurisdiction of civil actions . . . in which . . . the debt or damages claimed does not exceed the sum of $10,000, exclusive of interest and costs . . ."

§ 11-962, Ibid:

"In a civil action commenced in the United States District Court for the District of Columbia, other than an action for equitable relief, where it appears to the satisfaction of the court at or subsequent to any pretrial hearing but prior to trial thereof that the action will not justify a judgment in excess of $10,000, the court may certify the action to the District of Columbia Court of General Sessions for trial."

STATEMENT OF POINTS

The points on which the appellant intends to rely on appeal are:

1. That the trial court erred in not certifying this action to the District of Columbia Court of General Sessions for trial.

2. That the trial court erred in failing to find the appellee's conduct terminated whatever agency relationship may theretofore have existed between the appellant and the appellee by virtue of the listing given by the appellant to the appellee.

3. That the trial court erred in finding that the appellant sold his property through the use, by him, of an agent or broker.

4. That the trial court erred in granting the appellee's motion for a directed verdict.

5. That the trial court erred in failing to grant the appellant's motion for a directed verdict.

SUMMARY OF ARGUMENT

When this action came on for trial on January 3rd, 1966, the only relief sought was a judgment for $4,250, interest and costs, arising out of a cliam for a real estate broker's commission; consequently, it was patent prior to trial that this action could not conceivably justify a judgment in excess of $10,000 and, therefore, the trial court was required to certify the action to the District of Columbia Court of General Sessions for trial.

The appellee precluded himself from the right to a commission from the appellant not only by failing to reveal the identity of the Kimbles' principal to the appellant and by failing to reveal to the appellant that the Kimble check was worthless but also by being the one who procured the Kimbles as straw parties and signing their names in acceptance of the appellant's counter-offer.

The appellant had the inherent right to sell his own property without being obliged to pay the appellee a commission, provided that the appellant did not invite the aid of an agent or a broker and in the absence of an express agreement to the contrary. The appellant was not a party to any such agreement and since the appellee was not a party to the Chutter contract and was never so situated as to rely upon the representations made therein, the appellee is without standing to invoke the doctrine of estoppel.

In the opinion of the appellant, the foregoing arguments reflect the law applicable to this action and, therefore, the judgment of the trial court should be reversed and, if this Court deems a new trial appropriate, remanded with instructions to the trial court to certify this action to the District of Columbia Court of General Sessions for trial.

ARGUMENT

I

The United States District Court for the District of Columbia Was Required to Certify This Action to the District of Columbia Court of General Sessions for Trial

It is well settled, as stated in *Laughlin v. Cummings,* 70 App. D.C. 192, 105 F.2d 71, that "Lack of jurisdiction may be raised at anytime." Therefore, although the trial court's jurisdiction has not previously been questioned in this action, it would seemthat the appellant is not precluded from questioning it at this time.

On February 27th, 1962, when this action was filed, the trial court had jurisdiction over civil actions, with certain exceptions not applicable to this action, in which the debt or damages claimed exceeded the sum of $3,000, exclusive of interest and costs. However, the Act of Oct. 23, 1962, §§ 2 & 3, 76 Stat. 1171, amended what then were §§ 11-755(a) & 11-756(a), respectively, of the D. C. Code (1961 ed.), those sections now being, by virtue of the codification of the Act of Dec. 23, 1963, c. 9, sub. III, §§ 11-961(a) & 11-962, 77 Stat. 489, 490, §§ 11-961(a) & 11-962, respectively, of the D. C. Code (1961 ed., Supp. V, 1966), conferred upon the District of Columbia Court of General Sessions exclusive jurisdiction of civil actions, again with certain exceptions not applicable to this action, in which the debt or damages claimed do not exceed the sum of $10,000, exclusive of interest and costs, and authorized the United States District Court for the District of Columbia to certify a civil action, other than an action for equitable relief, brought in that court to the Court of General Sessions for trial, where it appears to the satisfaction of the court at or subsequent to a pretrial hearing but prior to trial of the action that the action will not justify a judgment in excess of $10,000.

This Court has consistently held that the District Court has broad discretion in the exercise of its certifying authority; *Gray v. Evening Star Newspaper Co.*, 107 U.S. App. D.C. 292, 277 F.2d 91, and cases cited therein; but that such discertion may not be arbitrarily exercised; *Davis v. Peerless Insurance Co.*, 103 U.S. App. D.C. 125, 255 F.2d 534. However, in each of the cases where this Court so held, the District Court had in fact certified the action; whereas, the question now presented is whether the District Court has any discretion whatsoever where, as here, it is patent prior to trial that no equitable relief is being sought and that the only claim to be tried for a real estate broker's commission in the sum of $4,250, interest and costs, so that the action cannot conceivably justify a judgment in excess of $10,000. If so, it would seem, of necessity, that such discretion would be an arbitrary one, with the District Court having the power to pick and choose among such actions and to determine, without any judicial rational, which of those actions it will retain for trial and which it will certify.

It is respectfully submitted that, notwithstanding the permissive language of what is now § 11-962 of the D. C. Code, the District Court does not have any discretion when it comes to certifying an action but merely has discretion in determining, in the first instance, whether the action will justify a judgment in excess of $10,000 and that, having determined judiciously that the action will not justify a judgment in excess of $10,000, the District Court has no alternative but to certify the action since the District Court is without jurisdiction to try the action.

In *Gassenheimer v. District of Columbia*, 6 App. D.C. 108, it was held that legislation conferring exclusive jurisdiction in certain cases upon one court will, by implication, oust the jurisdiction of another court which theretofore had concurrent jurisdiction in such cases and will render ineffective the results of a trial of such case had in the latter court subsequent to the effective date of the amendatory statute even though the case had been pending in the latter court prior to the enact-

ment of the amendatory statute. In that case, as in others, this Court held that the failure of counsel to raise a jurisdictional question in the trial court did not operated to confer jurisdiction upon the trial court nor to cure the jurisdictional defect in the trial court's decision. *U.S. ex rel. Tungsten Reef Mines Co. v. Ickes,* 66 App. D.C. 3, 84 F.2d 257; and, where it was held that lack of jurisdiction may be originally advanced on appeal, *Wilbur v. Burley Irr. Dist.*, 61 App. D.C. 145, 58 F. 2d 871.

Read in context, it would appear that what is now § 11-962 of the D. C. Code is but a saving clause; however, it is to be distinguished from a saving clause such as appears in the Act of July 25, 1958, 72 Stat. 415, by virtue of which U.S.C. §§ 1331 & 1332 were amended and the jurisdiction of Federal district courts with respect to actions coming under those sections became limited to actions in which the matter in controversy exceeds the sum of value of $10,000. Section 3 of that Act specifies:

> "This Act shall apply only in case of actions commenced after the date of enactment of this Act."

Neither the Act of Oct. 23, 1962, nor the codifying Act of Dec. 23, 1963, nor any other statute contains a saving clause expressly excluding an action in which only a remedy at law, as differentiated from equitable relief, is sought from the operation of the Act of Oct. 23, 1962, except such actions as were on trial on the effective date of that Act. In *Washington Home for Incurables v. American Security & Trust Co.*, 38 App. D.C. 421, this Court, at 431, was called upon to decide whether the application for appeal to the Supreme Court made in that case was saved by the silence of the saving clause in the Judicial Code of Mar. 3, 1911, c. 231, 36 Stat. 1087, concerning such cases. This Court denied the application and the Supreme Court, in 224 U.S. 486, 32 S. Ct. 554, 56 L. Ed. 854, affirmed this Court's denials in that case and in a companion

case, *Vermillion v. B. & O. R. Co.*, 38 App. D.C. 434. In denying the application in the *Washington Home* case, this Court quoted the following statement made by Chief Justice Waite in *Baltimore P. R. Co. v. Grant*, 98 U.S. 398, 25 L. Ed. 232:

> "It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall within the law."

The fact that § 11-962 permits the District Court to make the determination, in the first instance, as to whether an action will justify a judgment in excess of $10,000 does not, of itself, clothe the District Court with jurisdiction of the action for, as shown in *Laughlin v. Cummings, supra,* a trial court's taking of the steps necessary for its determination as to whether it has jurisdiction of an action does not, of itself, clothe that court with jurisdiction to try the action. Nor can any finds on the merits made by such court in an action of which it had no jurisdiction be of any effect. *Rowe v. Nolan Finance Co.*, 79 U.S. App. D.C. 35, 142 F.2d 93.

Before this action came on for trial on January 3rd, 1966, the record clearly showed that no equitable relief was being sought and that the only matter to be tried was the appellee's claim for a real estate broker's commission in the sum of $4,250, interest and costs, so that the action could not conceivably have justified a judgment in excess of $10,000, the minimum required for the District Court to have jurisdiction to try such an action. These facts being patent prior to trial, it is respectfully submitted that this action left no room for the District Court to exercise any discretion and that the District Court had no jurisdiction of the action for trial and no alternative but to certify the action to the Court of General Sessions for trial and that the verdict and judgment entered herein on January 4th, 1966, are without effect. Therefore, it is respectfully submitted that this Court should remand this action to the District Court with instructions to vacate the said verdict

and judgment and to certify this action to the Court of General Sessions for trial in accordance with such other instructions as this Court may deem appropriate.

II

The Appellee, by His Conduct, Precluded Himself From the Right to a Commission From the Appellant

In *Brown v. Coates et al,* 102 U.S. App. D.C. 300, 253 F.2d 36, the plaintiffs, who sought to sell their house through the defendant, a real estate broker, and wound up contracting to exchange their house for a house owned by the broker, sued the broker to recover punitive as well as compensatory damages for fraud. From a finding for the plaintiffs and an award of both compensatory and punitive damages, the defendant appealed. Among the charges to the jury, the trial court instructed the jury that if it found that the plaintiffs had retained the broker as their agent then, as a matter of law, the jury was instructed that the broker owed the plaintiffs the highest fidelity and was bound to inform them of every important development affecting their interests. This Court not only held that charge to be correct but, commenting upon another charge, whereby the trial court instructed the jury that if it found for the plaintiffs, it must allow the broker a commission amounting to 5 percent, this Court said:

> "On this record it would have been more appropriate for the court to instruct the jury that if it found . . . [the broker] to be faithless to the trust reposed in him as agent, it could *disallow* his commission entirely. Since the jury's verdict makes it obvious that it found . . . [the broker] to be an agent and that as such he was faithless to his duty, the instruction with respect to the commission was more favorable to him than he was entitled to receive." (Emphasis as in the original; brackets supplied.)

In the instant case, there can be no question but that the appellee's

claim to a commission from the appellant was predicated solely upon the appellee's contention, as stated in the complaint (JA 2), that the appellant had sold the appellant's property, without the appellee's consent, during a period when the appellee was the appellant's "exclusive" agent. As the appellant's agent, the appellee owed the appellant the highest fidelity, which, it is respectfully submitted, the appellee breached, and was bound to inform the appellant full of every development affecting the appellant's interests, which, it is respectfully submitted, the appellee utterly failed to do.

The evidence clearly established by the appellee's own testimony is that when the appellant signed the listing card sued on, the appellee had a listing card which the appellant had previously signed (JA 69); that, in fact, the appellee had a listing on the appellant's property, from either the appellant or the appellant's co-owner, as early as August or September of 1961 (JA 1, 31-32, 35-36); that the appellee had prepared an offer (JA 33, 68-69) in the names of straw parties procured by the appellee (JA 34-35, 45) and submitted the offer to the appellant at the time the appellant signed the listing card sued on (JA 35), knowing that the straw parties would not be able to perform if their offer were accepted (JA 34-35) and without having received anything in writing from the person alleged by the appellee at trial as having been the straw parties' principal to indicate any association whatsoever between that person and the straw parties or between that person and the appellant or the appellant's property (JA 38, 44); that at the same time, the appellee showed the appellant a check signed by one of the straw parties at the appellee's request for $5,000 (JA 34), the amount required by the offer as a deposit (JA 34-35, 68), knowing that the check was worthless (JA 35) and without having received any deposit from the person alleged by the appellee at trial to have been the straw parties' principal (JA 38, 44-45) but gave the straw parties the appellee's own check to be used in the event the offer resulted in a contract (JA 39); that in acceptance

of the appellant's counter-offer, the appellee personally signed the names of the straw parties, contracting to pay $77,500 in cash although the counter-offer did not require all cash (JA 38, 70) and delivered the signed contract to the appellant (JA 33, 39-40); that between the submission of the offer and the appellee's signing of the counter-offer, the appellee communicated frequently with the appellant on behalf of the person alleged by the appellee at trial to have been the straw parties' principal (JA 36, 44); and that the appellee actively sought to conceal from the appellant the identity of the person alleged by the appellee at trial to have been the straw parties' principal (JA 38, 45-46, 70-71) although the appellee knew that strained relations existed at that time between the appellant and that person (JA 41, 44).

The appellee also testified that the appellant knew that the straw parties were not principals (JA 45-46); however, the record is void of any indication as to what the appellee's conclusion concerning the appellant's knowledge was based upon or as to when the appellant acquired that knowledge, except the fact that although the appellant rejected the straw parties' counter-counteroffer of $75,000 in cash and continued to insist upon $77,500 (JA 36, 70-71) and, apparently, declined to perform under the contract with the straw parties for $77,500 in cash, the appellant sold and conveyed his property to the Chutters for only $73,600 (JA 32, 60-64, 66).

That the appellee's admitted conduct precluded him from whatever rights he might otherwise have had to a commission from the appellant is evident from the facts and decision in *Harten v. Loffler,* 31 App. D.C. 362, cited with approval and quoted from in *Searl et ux. v. Earll,* 95 U.S. App. D.C. 151, 221 F.2d 24. In the *Harten* case, the plaintiffs, who were real estate brokers, sued the defendant for a commission on the grounds, unlike in the instant case where the appellee was not the efficient cause of the appellant's sale but relied solely upon the "exclusiveness" of his agency, that the plaintiffs had procured a buyer for the

defendant on terms acceptable to the defendant. The evidence was that one of the plaintiffs approached the defendant at the suggestion of a prospective purchaser of the defendant's property and was retained by the defendant to find a purchaser for the property. That plaintiff told the defendant that he had a prospective purchaser but refused to disclose the identity of that party until several weeks later. In the meantime, that plaintiff frequently communicated with the seller, as the appellee in the instant case did, "on behalf of" the purchaser. The plaintiffs' purchaser finally signed a contract with the seller on the seller's terms. From a judgment for the plaintiffs, the seller appealed. This Court reversed the trial court, holding that the trial court should have directed a verdict for the seller and stating:

> ". . . it is a thoroughly well-established principle that, out of consideration for human weaknesses, the law will not permit such brokers, and others occupying fiduciary relations, to put themselves in a position where they are subject to the demands of conflicting duties; without at least the full knowledge and consent of both vendor and vendee, even if then, one cannot act as the agent and representative of both in the same transaction. The duty of an agent for the vendor is to obtain the highest possible price for his property; of the agent for the purchaser to buy it for the lowest price. These duties are so irreconcilable and conflicting that they cannot be performed by the same agent without danger that he will sacrifice the interests of one to the other, or both to his own when his commission is dependent upon the consummation of the sale. If he so acts as the agent of each without the knowledge of both, he is clearly guilty of a breach of his contract, and commits a fraud by his concealment. A contract under such conditions is *contra bonos mores*, and the law, acting in harmony with morals, will refuse to enforce it."

The Court's attention is invited to these distinguishing features between the *Harten* case and the instant one. In the *Harten* case, the broker did not procure straw parties on behalf of the purchaser and actively attempt to conceal the purchaser's identity, as the appellee did in the instant case. In the *Harten* case, there was no question as to the bona fides of the deposit, while in the instant case, the only deposit was a worthless check procured by the appellee with full knowledge and aforethought that it was worthless; in the *Harten* case, the broker had no cause to believe that the seller would not sell to the broker's prospective purchaser, while in the instant case, the appellee knew that strained relations existed between the appellant and the prospective purchaser and that, therefore, the appellant might have preferred to pay the appellee a commission without practical benefit to the appellant rather than be duped into contracting to sell his property to a person who had ill feelings toward him; and, finally, in the *Harten* case, there was no suggestion that anyone but the purchaser signed the contract, while in the instant case, it was the appellee who signed the straw parties' names in acceptance of the appellant's counter-offer.

If one may consider the degree of culpability on the part of the brokers in each of these cases, there seems little room for doubt that the appellee in this case was the far more culpable and, if the broker in the *Harten* case, who was the efficient cause of the sale of the seller's property, had breached his contract, it would seem that the appellee in the instant case, who did not sue for a commission based upon the contract he procured but upon a sale made without his assistance during the period of his "exclusive agency," would, *a fortiori,* be precluded from effectively asserting a right to a commission from the appellant.

The strained relations between the appellant and the appellee's prospective purchaser bring to mind the language in *Mannix v. Hildreth,* 2 D.C. 259:

> " . . . no one would sell upon equal terms to a first-class business man, and to an habitual drunkard, or well-known insolvent, and the ordinary man would not sell at all to a person whose very occupancy would tinge the neighborhood with bad repute [or probably not even to a person who bears him ill will]." (Brackets added.)

Furthermore, it is respectfully submitted, the appellee's procurement of the straw parties, his posting his own $5,000 check with the straw parties for partial performance of a contract between the appellant and the straw parties if one should arise, his signing the names of the straw parties in acceptance of the appellant's counter-offer, albeit with the authority of the straw parties but no suggestion of authority from the undisclosed principal, in view of the appellee's failure, during the course of his conduct, to disclose the identity of the purchaser, rendered the appellee the principal on that contract. *Searl et ux. v. Earll, supra; Resnick v. Abner B. Cohen Advertising, Inc.*, D. C. Mun. App., 104 A.2d 254. In *Wardman v. Washington Loan & Trust Co.*, 67 App. D.C. 184, 90 F.2d 429, that an agent's acceptance of an option to purchase the property he had been retained to sell terminated the agency and precluded the agent from claiming a commission even though the agent never exercised the option. It would seem that here, where the appellee, by operation of law, stands in the shoes of the undisclosed purchaser by virtue of the appellee's conduct, the appellee's signing of the names of the straw parties in acceptance of the appellant's counter-offer terminated whatever agency may theretofore have existed between the appellant and the appellee with respect to the appellant's property and precluded the appellee from recovering a commission from the appellant.

In view of the trial court's suggestion that the appellee had been obliged to reveal who the purchaser was to be (JA 70A) and in view of the appellee's admissions that he not only failed to reveal the identity

of the purchaser but actively sought to conceal it from the appellant, the appellant fails to comprehend the trial court's rationale in failing to grant the appellant's motion for a directed verdict and granting the appellee's.

CONCLUSION

This action coming on for trial on January 3rd, 1966, after the effective date of the Act of October 23, 1962, being void of any prayer for equitable relief or any grounds therefor and being solely for a real estate broker's commission in the sum of $4,250, interest and costs, the action could not conceivably have justified a judgment in excess of $10,000; therefore, the trial court was without jurisdiction to try the action but was required to certify it to the District of Columbia Court of General Sessions for trial and the verdict and judgment entered herein on January 4th, 1966, are of no effect. Furthermore, even if the trial court had jurisdiction of this action, it erred in failing to grant the appellant's motion for a directed verdict and in granting the appellee's motion for a directed verdict in that the evidence clearly shows that the appellee, by his conduct, terminated whatever agency relationship may theretofore have existed between the appellant and the appellee and precluded himself from any right to a commission from the appellant.

Therefore, it is respectfully submitted that the judgment in favor of the appellee should be reversed or that this action should be remanded to the trial court with instructions to certify this action to the District of Columbia Court of General Sessions for trial in accordance with such instructions as this Court may deem appropriate.

Respectfully submitted,

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Attorney for Appellant

CONTENTS OF JOINT APPENDIX

[Filed Feb. 27, 1962]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES E. REID
1133 - 24th Street, N. W.
Washington, D. C.
Plaintiff,

v.

J. FRANCIS HARRIS, 3rd
2531 P Street, N. W.
Washington, D. C.
Defendant.

673-62

COMPLAINT TO RECOVER COMMISSION UNDER EXCLUSIVE CONTRACT FOR SALE OF REAL ESTATE

(1) Jurisdiction is founded on § 11-305 et seq. of the District of Columbia Code (1961 edition).

(2) Plaintiff James E. Reid is a real estate broker duly licensed under the laws of the District of Columbia.

(3) On December 16, 1961 defendant J. Francis Harris, 3rd and Sylvia Suter Harris, his wife, were record holders of title to Lot 815 in Square 1262 in the District of Columbia, premises known and hereinafter referred to as 2620 P Street, N.W., in common with Lloyd Salyer, Incorporated. By deed dated July 20, 1961, recorded January 4, 1962, defendant J. Francis Harris, 3rd, Sylvia Suter Harris, and Lloyd Sayler, Incorporated conveyed 2620 P Street, N. W. to John W. Truver, who in turn, by deed dated January 2, 1962 recorded January 4, 1962, reconveyed said premises to defendant J. Francis Harris, 3rd and Sylvia Suter Harris, his wife, as tenants by the entirety.

(4) On December 16, 1961 defendant J. Francis Harris, 3rd gave a thirty (30) day exclusive written listing for the sale of 2620 P Street,

N.W. for Eighty-five Thousand Dollars ($85,000) to plaintiff James E. Reid, in which written listing defendant J. Francis Harris, 3rd agreed to pay plaintiff a commission of Five Percent (5%) on any sale made during the thirty (30) day period beginning December 16, 1961. A photocopy of the listing card executed by defendant is attached hereto marked "Exhibit A".

(5) Notwithstanding plaintiff's exclusive agency to sell 2620 P Street, N. W., defendant without the consent of plaintiff sold said premises to Reginald F. Chutter and Adriana J. Chutter, his wife, and defendant J. Francis Harris, 3rd and Sylvia Suter Harris, his wife, conveyed said premises to Reginald F. Chutter and Adriana J. Chutter, his wife, as tenants by the entirety by deed dated January 11, 1962, recorded January 24, 1962.

(6) Plaintiff has made demand on defendant for the payment of his commission on the sale and conveyance referred to just above at the rate of Five Percent (5%) which defendant has failed and refused to pay.

WHEREFORE Plaintiff demands judgment against the defendant in the sum of Four Thousand Two Hundred Fifty Dollars ($4,250), plus interest from January 11, 1962, and costs of this action.

/s/ James E. Reid
Plaintiff

/s/ Weston B. Grimes
Carey & Grimes
Attorneys for Plaintiff

[Exhibit A to Complaint]

I hereby authorize and give James E. Reis the exclusive right to sell premises known as 2626 P St for a period of 30 days

Minimum Price to be $5,000.00 Dollars. Taxes, insurance, rent, etc., to be adjusted to date of transfer.

I also agree to pay said James E Reis a commission of 5 % in case sale is made during said period.

Owner [signature] [signature]

Address 2626 P St Phone [illegible]

Remarks: New Roof

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

JAMES E. REID
1133 24th Street, N. W.
Washington, D. C.
Plaintiff,

vs.

J. FRANCIS HARRIS, 3rd
2531 P Street, N. W.
Washington, D. C.
and
JERRY B. KIMBLE
1133 24th Street, N. W.
Washington, D. C.
and
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
a corporation,
SERVICE TO BE MADE UPON:
Albert F. Jordan,
Superintendent of Insurance for
the District of Columbia
1145 19th Street, N. W.
Washington, D. C.
Defendant.

Civil Action No.
673-62

[Filed Dec. 15, 1962]

DEFENDANT'S ANSWER TO COMPLAINT and COUNTERCLAIM

First Defense

The defendant, J. Francis Harris, 3rd, as and for his first defense, avers that the plaintiff's complaint fails to date a cause of action upon which relief can be granted.

Second Defense

This defendant, as and for his second defense, admits the allegations contained in paragraphs 1 and 3 of the said complaint and exclusive of the phrase "Notwithstanding plaintiff's exclusive agency to sell 2620 P Street, N.W.," the allegations contained in paragraph 5 of the said complaint, and, except as aforesaid, the defendant denies each and all of the other allegations set forth in the said complaint.

Third Defense

This defendant, as and for his third defense, avers as follows:

1. That on or about December 6, 1961, this defendant signed a document containing text similar to if not identical with the text contained in Exhibit A attached to the complaint, which said exhibit is incorporated by reference herein as thoughfully set forth herein, except that at the time of this defendant's signing of the said document, the said document bore the date "6" and not "16" December, 1961.

2. That on December 21, 1961, this defendant was informed and believes that on or about December 9, 1961, the plaintiff wrongfully, maliciously, fraudulently and deceitfully conspired with the defendants Minnie L. Kimble and Jerry B. Kimble to cause and did cause the defendants Kimble to wrongfully, maliciously, fraudulently and deceitfully submit, as strawmen for the plaintiff, an offer in writing through the plaintiff to this defendant for the purchase of the premises 2620 P Street, N.W., Washington, D.C., and is wrongfully, maliciously, fraudulently and deceitfully to draw and deliver to the plaintiff for exhibition to this defendant a check in the face amount of $5,000.00, known to the plaintiff to be worthless, as a deposit in connection with the said offer; there after, the plaintiff did wrongfully, maliciously, fraudulently and deceitfully exhibit the said check to this defendant wrongfully, maliciously, fraudulently and deceitfully concealing from this defendant that the plaintiff had any interest in the said offer other than as a real estate broker or agent and that the said check was worthless; this defendant

relied upon the said offer as being bona fide and the said check being good, and submitted a counter-offer in writing through the plaintiff to sell the said property to the defendants Kimble for the sum of $77,-500.00 cash, which said counter-offer the defendants Kimble, still acting as strawmen for the plaintiff, accepted in writing without the plaintiff or the defendants Kimble ever revealing the plaintiff's interest in the transaction other than as a real estate broker or agent or that the said check was worthless.

3. On December 21, 1961, this defendant was informed of the said conspiracy and immediately thereafter and therefore, expressly and in writing delivered to the plaintiff, terminated the said agency.

Fourth Defense

This defendant, as and for his fourth defense, avers that on January 24, 1962, he, together with his then wife, conveyed the said property for a sales price of $73,600.00 whereof a commission of 5% or $3,680.00 was paid to the real estate broker handling this transaction.

Having fully answered the complaint filed herein, defendant J. Francis Harris, 3rd, demands judgment against the plaintiff, James E. Reid, dismissing the said complaint, assessing costs against the plaintiff, and awarding reasonable attorney's fees to defendant Harris.

Counterclaim

First Count

The defendant J. Francis Harris, 3rd, as and for his first cause of action against the plaintiff, James E. Reid, states and alleges as follows:

1. That the value or amount of the matter in controversy in this cause of action exceeds the sum of $3,000.00, exclusive of interest, costs and attorney's fees and the said matter is otherwise within the jurisdiction of this court.

2. That on December 6, 1961, this defendant signed a document containing text similar to if not identical with the text contained in Exhibit A attached to the complaint, which said exhibit is incorporated by reference herein as though fully set forth herein, except that at the time of this defendant's signing of the said document, the said document bore the date "6" and not "16" December, 1961.

3. That on December 21, 1961, this defendant was informed and believes that on or about December 9, 1961, the plaintiff wrongfully, maliciously, fraudulently and deceitfully conspired with the defendants Minnie L. Kimble and Jerry B. Kimble to cause and did cause the defendants Kimble wrongfully, maliciously, fraudulently and deceitfully to submit, as strawmen for the plaintiff, an offer in writing through the plaintiff to this defendant for the purchase of the premises 2620 P Street, N.W., Washington, D.C., and is wrongfully, maliciously, fraudulently and deceitfully to draw and deliver to the plaintiff for exhibition to this defendant a check in the face amount of $5,000.00, known to the plaintiff to be worthless, as a deposit in connection with the said offer: thereafter, the plaintiff did wrongfully, maliciously, fraudulently and deceitfully submit the said offer in writing to this defendant for acceptance and did wrongfully, maliciously, fraudulently and deceitfully exhibit the said check to this defendant wrongfully, maliciously, fraudulently and deceitfully concealing from this defendant that the plaintiff had any interest in the said offer other than as a real estate broker or agent and that the said check was worthless: this defendant relied upon the said offer as being bona fide and the said check being good, and submitted a counter-offer in writing through the plaintiff to sell the said property to the defendants Kimble for the sum of $77,500.00 cash, which said counter-offer the defendants Kimble, still acting as strawmen for the plaintiff, accepted in writing without the plaintiff or the defendants Kimble ever revealing the plaintiff's interest in the transaction other than as a real estate broker or agent or that the said check was worthless.

4. That the plaintiff's and defendants Kimble said wrongful, malicious, fraudulent and deceitful acts caused this defendant to suffer great financial loss in that, despite this defendant's diligent efforts thereafter, this defendant could not sell the said property for more than $73,600.00.

Second Count

The defendant, J. Francis Harris, 3rd, as and for his second cause of action against the plaintiff, James E. Reid, states and alleges as follows:

1. That this defendant incorporates by reference herein each and every allegation contained in Paragraph 1 of the first count of this counterclaim as though fully set forth herein.

2. That on or about June 15, 1961, this defendant retained the services of the plaintiff as a real estate broker or salesman to sell the premises 2620 P Street, N.W., Washington, D.C.

3. That on December 21, 1961, this defendant was informed and believes that on or about July 15, 1961, ended diverse other times, the plaintiff, while retained by this defendant as aforesaid, wrongfully, maliciously, deceitfully, falsely and slanderously stated to prospective purchasers of the said property that this defendant was a crook, that this defendant did not work and that the buildings built by this defendant were cheaply and faultily built.

4. That for many years immediately previous to the plaintiff's said wrongful, malicious, deceitful, false and slanderous statements, this defendant enjoyed the reputation of being and was and still is an honorable, ethical and active businessman, engaged in business principally in the Georgetown community of the District of Columbia.

5. That the plaintiff's said wrongful, malicious, deceitful, false and slanderous statements caused this defendant to suffer great embarassment, mental anguish and financial loss, the latter particularly having been in connection with the sale of the said property in that this defend-

ant could not sell the said property for more than $73,600.00 despite this defendant's diligent efforts to do so whereas, this defendant has been informed and believes, the said property had a fair market value in excess of $77,000.00 at all times pertinent hereto.

WHEREFORE, the premises considered, the defendant, J. Francis Harris, 3rd, demands judgment as follows:

FIRST: That this defendant be awarded compensatory damages in the sum of $3,900.00 and punitive damages in the sum of $50,000.00 against the plaintiff, James E. Reid, jointly and severally with the defendants The Fidelity and Casualty Company of New York, Minnie L. Kimble and Jerry B. Kimble as to the first cause of action set forth in this counterclaim.

SECOND: That this defendant be awarded compensatory damages in the sum of $15,000.00 and punitive damages in the sum of $25,000.00 against the defendants The Fidelity and Casualty Company of New York jointly and severally with the plaintiff, James E. Reid, as to the second cause of action set forth in this crossclaim.

THIRD: That this defendant be awarded and that the plaintiff, James E. Reid, be required to pay, jointly and severally the defendants The Fidelity and Casualty Company of New York, Minnie L. Kimble and Jerry B. Kimble reasonable attorney's fees to this defendant.

FOURTH: That the costs hereof be assessed against the plaintiff, James E. Reid, jointly and severally with the defendants The Fidelity and Casualty Company of New York, Minnie L. Kimble and Jerry B. Kimble.

FIFTH: That this defendant be granted such other and further relief as the Court may deem just and proper.

Jury Trial Requested by

/s/ J. Francis Harris, 3rd

/s/ Alfred G. Grof
Attorney for Defendant Harris

[Jurat - Dec. 15, 1962]
[Certificate of Service, Dec. 15, 1962]

[Filed November 19, 1963]

PRETRIAL PROCEEDINGS

November 19, 1963

Action to recover money for real estate commission.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS AND STIPULATE THERETO: On Dec. 16, 1961, D. J. Francis Harris, III, and Silvia Suter Harris, his wife, were record holders of title to lot 815, square 1262, in Wash., D.C. premises known as 2620 P St., N.W. in common with Lloyd Salyer, Inc. For the purposes of this case, at all pertinent times, J. Francis Harris, III was one of the record title holders to said property, and he listed said property with P for sale for $85,000.00. Said listing was exclusive and was for a period of 30 days. Some time in the month of Jan. 1962, the property in question was sold to Reginald F. and Adriana J. Chutter. The deed was recorded Jan. 24, 1962.

By Order of this Court, D Harris was granted leave to implead the Fidelity & Casualty Co. of New York, Minnie L. Kimble and Jerry B. Kimble as co-defendants in this case. The Kimble's are in default and the insurer has been dismissed.

PLAINTIFF CLAIMS that he is and at all pertinent times was a real estate broker duly licensed to do business under the laws of the D of C, and he asserts that the listing of the property in question was made by D on Dec. 16, 1961; that the property was sold within 30 days, the period of P's exclusive contract listing, and P therefore seeks a commission of $4,250.00, plus interest from Jan. 11, 1962 and costs of this action.

P asserts that the sale was consummated on or before Jan. 11, 1962.

DEFENDANT DENIES he is indebted to P for any amount whatsoever, contending that the listing to P was dated and given Dec. 6, 1961; that the date on said listing was altered without D's knowledge, consent

or approval from "6 Dec. 1961" to "16 Dec. 1961"; denies that P was a duly-licensed real estate broker or salesman in the D of C at the time this claimed cause of action arose; asserts that P terminated the listing prior to any sale of the property by P's hereinafter-described wrongful acts; asserts that Harris notified P in writing prior to any sale of the property of termination of the listing, to wit, by letter dated on Dec. 21, 1961; asserts that said property was not sold until subsequent to said termination and subsequent to the 30-day period commecning Dec. 6, 1961; asserts that the property was subsequently sold for $73,600.00, less a commission of 5%, namely, $3,680.00, which was paid to the real estate broker who procured the purchaser.

D Harris, on Jan. 7, 1962 received an offer for purchase of the property from the Chutter's, and on the same day or a day subsequent, D Harris made a counter-offer for the sale of the property for $73,-600.00.

D HARRIS HAS COUNTERCLAIMED AGAINST P AND CROSS-CLAIMED AGAINST THE KIMBEL'S asserting the fraud and deceit of these parties, in that P, while holding the said listing, engaged the Kimbles to act and the Kimbles did act as straw parties for P in signing a written offer and written counter-offers to purchase the said property, culminating in a contract to purchase the said property for $77,500.00 cash, which P and the Kimbles knew the Kimbles were neither ready, willing nor able to perform, and, in conjunction therewith, the P engaged the Kimbles to utter and the Kimbles did utter a check for $5,000.00 as earnest money in conformity with the said offer and counter-offers, which P and the Kimbles knew to be a worthless check and which P and the Kimbles did not intend would be cashed unless and until P sold the said property to some then undetermined third party, all with the intent that the said check would be and was exhibited to Harris and that the said offer and counter-offers would be and were submitted to Harris without revealing to Harris that the Kimbles were acting merely as straw parties or that the said check was worthless for the purpose of

maliciously, fraudulently and deceitfully inducing Harris to enter into the said contract, which Harris, relying upon P's and the Kimbles' bona fides, did. Harris, upon discovering the said fraud and deceit, diligently sought to sell the said property at the highest available price and subsequently sold the said property for $73,600.00 less a sales commission of $3,680.00 paid to a real estate broker who had procured the bona fide purchasers.

Harris also counterclaims against P on the grounds of slander in that the P, while holding a prior listing on the said property on which Harris had financial and professional interests as well as being one of the record title owners, maliciously and falsely represented to one or more third persons that Harris was a thief, a swindler and a cheat, that Harris did not work and did not own or ever have anything to do with the said property, resulting in great embarrassment, mental anguish and financial loss to Harris, who, consequently had great and unusual difficulty in selling properties which he owned and had improved.

D Harris therefore, because of the fraud and deceit practice, seeks to recover $7,580.00 compensatory and $50,000.00 as punitive damages; and as to the slander, seeks to recover $15,000.00 as compensatory and $25,000.00 as punitive damages, plus costs of this action and a reasonable attorney's fee.

P, asserting that the allegations as to fraud, deceit and slander, are untrue, denies all said allegations; asserts that the alleged slander is not actionable.

Further, P says that at the time at the Kimble contract for the purchase of the property was submitted to Harris, Harris was told and thoroughly understood that the Kimbles were mere straw parties, that the check for $5,000, while not good at the time of submission of the contract, would be made good by Kimbles' principal at such time as the contract was accepted; and further, that although Harris agreed to sell

the property to the Kimbles, Harris failed and refused to complete the sale.

The Kimbles were not acting as straw parties for P, nor did P have any interest in the sale except for his commission.

P also defends on the basis that any statements he may have made with reference to D Harris are true.

STIPULATIONS

Counsel for D Harris agrees to submit to counsel for the P and the Clerk of Court, on or before Jan. 2, 1964, a written, itemized statement of the compensatory damages which will be claimed at the trial.

Counsel for P agrees to supply to Clerk of Court and D's (Harris') counsel on or before Jan. 2, 1964, the name or names and addresses of the persons for whom the Kimbles were acting as straw parties, as claimed herein.

The parties agree to file with the Clerk of the Court and to mutually exchange, on or before Jan. 2, 1964, a list of the names and addresses of all witnesses known to them, who have knowledge of any aspect of this case, indicating those who may be used at the trial. Impeachment witnesses are not to be included.

A check marked P-1 may be admitted in evidence.

Counsel for P has in his possession documents marked P-2 through P-8 initialled by Examiner, which he requests be admitted in evidence, but D's counsel will make no agreement with relation thereto.

Counsel for D Harris has in his possession a copy of a letter from Harris to P, dated Dec. 21, 1961, and a copy of a real estate sales contract between D Harris and the Kimbles, which he requests be admitted in evidence. These may be admitted if initialled by counsel for P.

The Examiner has requested counsel for the parties to appear at

trial with the maximum amount of authority to settle this case which will be allowed them by their principals.

Pretrial Examiner

Trial Counsel:

Mark P. Friedlander,
Esq. for P

[Filed Jan. 4, 1966]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 3rd day of January, 1966, before the Court and a jury of good and lawful persons of this district, to wit:

Gary M. Bradford	John F. Inman
Robert L. Brickner	James L. Ivey
Mrs. Mannie B. Marshall	Mrs. Grace H. Barrett
Russell E. Hines	William Bowe
George B. Lockwood	Mrs. Merva T. Beldon
Thomas L. Jackson	Mrs. Jessie B. Chillous

who, after having been duly sworn to well and truly try the issues between JAMES E. REID, plaintiff and J. FRANCIS HARRIS, 3RD, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 4th day of January, 1966, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendant by reason of the premises is the sum of three thousand six hundred eighty dollars ($3,680.00), with interest from January 22, 1962, by direction of the Court.

WHEREFORE, it is adjudged that said plaintiff recover of the said

defendant the sum of three thousand six hundred eighty dollars ($3,680.-00), with interest from January 22, 1962.

Robert M. Stearns
Clerk

By /s/ James B. Capetanio
Deputy Clerk.

Judge Alexander Holtzoff
Presiding

[Filed Jan. 14, 1966]

DEFENDANT'S MOTIONS TO SET ASIDE VERDICT AND JUDGMENT, ETC.

The defendant, J. Francis Harris, 3d, by and through his attorney, Alfred G. Graf, respectfully moves this Honorable Court to set aside the verdict and the judgment entered on the plaintiff's claim herein and to enter a judgment in accordance with the defendant's motion for a directed verdict made at the close of all the evidence adduced of the trial hereof had before a jury on the 3rd and 4th days of January, 1966, but denied by this Honorable Court or, in the alternative, to grant a new trial, and

FOR CAUSE HEREOF, the defendant respectfully submits to this Honorable Court that, based upon the said evidence, this Honorable Court should not have directed a verdict in favor of the plaintiff but should have granted the defendant's motion for a directed verdict for the following reasons:

1. The plaintiff knowingly and wilfully made false representations of material facts to the defendant and wilfully concealed from the defendant the fact that the said representations were false for the purpose of inducing the defendant to make the offer of December 16, 1961, upon

which the plaintiff's claim is predicated, to engage the services of the plaintiff as a real estate broker with respect to the defendant's property situated at 2620 P Street, N.W., Washington, D.C., and, thereby, the plaintiff did wrongfully induce the defendant to make the said offer.

2. The plaintiff failed to accept the said offer.

3. No consideration moved from or on behalf of the plaintiff to or on behalf of the defendant to support the plaintiff's claim.

4. The plaintiff's presentation to the defendant of an offer and counter-counter-offers with respect to the said property in the names of straws procured by the plaintiff on behalf of a principal whose identity was known to the plaintiff but whose identity the plaintiff sought to conceal and did conceal from the defendant and the plaintiff's false representation to the defendant that the said offer and counter-counter-offers were secured by a deposit of earnest money, when, in fact, the plaintiff knew that no earnest money had been deposited, terminated any contract of agency that may theretofore have existed between the plaintiff and the defendant.

5. The plaintiff's acceptance of the defendant's counter-offer to accept $77,500.00 for the said property terminated any contract of agency that may theretofore have existed between the plaintiff and the defendant with respect to the said property.

6. The ultimate sale of the said property by the defendant was without the aid or intervention of anyone acting on the defendant's behalf.

7. Such other good and sufficient reason as may be shown at the hearing, if any, to be had hereon.

ALFRED G. GRAF
Attorney for Defendant

POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS TO SET ASIDE, ETC.

These motions are confined to the trial had exclusively as to the plaintiff's claim. That claim is for a real estate broker's commission based upon a listing card which was admitted into evidence and whereof a copy is attached hereto and identified as Defendant's Exhibit 1; the defendant's sale pursuant to the contract whereof a copy was admitted into evidence and a copy is attached hereto, identified as Defendant's Exhibit 2 and hereinafter referred to as the Chutter contract; and the defendant's failure and refusal to pay the plaintiff any commission. At the jury had on the plaintiff's claim, the following evidence, in addition to the aforesaid exhibits, was presented without objection.

On December 16, 1961, when the defendant signed the listing card, the plaintiff presented the defendant with the document whereof a copy is attached hereto, identified as Defendant's Exhibit 3 and hereinafter referred to as the Kimble contract. At that time, the Kimble contract only had the $70,000.00 offer. At the same time, the plaintiff showed the defendant the check whereof a copy is attached hereto, identified as Defendant's Exhibit 4 and hereinafter referred to as the Kimble check. Thereupon, the defendant made a counter-offer of $77,500.00, which was reduced to writing on the reverse side of the Kimble contract and although signed by the defendant on December 16, 1961, was dated December 9, 1961.

Sometime during the summer or fall of 1961, the defendant or the defendant's then co-owner had given the plaintiff an earlier listing on the same property. In pursuit of that earlier listing, the plaintiff prepared and published a brochure which he mailed to people who made inquiries about the property and whose names and addresses he had committed to a list during the fall of 1961. Subsequent to the listing sued

which the plaintiff's claim is predicated, to engage the services of the plaintiff as a real estate broker with respect to the defendant's property situated at 2620 P Street, N.W., Washington, D.C., and, thereby, the plaintiff did wrongfully induce the defendant to make the said offer.

2. The plaintiff failed to accept the said offer.

3. No consideration moved from or on behalf of the plaintiff to or on behalf of the defendant to support the plaintiff's claim.

4. The plaintiff's presentation to the defendant of an offer and counter-counter-offers with respect to the said property in the names of straws procured by the plaintiff on behalf of a principal whose identity was known to the plaintiff but whose identity the plaintiff sought to conceal and did conceal from the defendant and the plaintiff's false representation to the defendant that the said offer and counter-counter-offers were secured by a deposit of earnest money, when, in fact, the plaintiff knew that no earnest money had been deposited, terminated any contract of agency that may theretofore have existed between the plaintiff and the defendant.

5. The plaintiff's acceptance of the defendant's counter-offer to accept $77,500.00 for the said property terminated any contract of agency that may theretofore have existed between the plaintiff and the defendant with respect to the said property.

6. The ultimate sale of the said property by the defendant was without the aid or intervention of anyone acting on the defendant's behalf.

7. Such other good and sufficient reason as may be shown at the hearing, if any, to be had hereon.

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Sometime during the summer or fall of 1961, the defendant or the defendant's then co-owner had given the plaintiff an earlier listing on the same property. In pursuit of that earlier listing, the plaintiff prepared and published a brochure which he mailed to people who made inquiries about the property and whose names and addresses he had committed to a list during the fall of 1961. Subsequent to the listing sued

on, the plaintiff again mailed copies of the brochure to a few of the people whose names appeared on the list compiled during the fall of 1961 but the plaintiff could not recall the name of any specific person to whom he had mailed a copy after the listing card sued on had been signed.

There followed a series of counter-counteroffers with respect to the Kimble contract and, finally, the defendant's counter-offer of $77,500.00 was accepted. However, the Kimbles were neither ready, willing nor able to buy the defendant's property and did not intend to be principals on the Kimble contract but merely straws procured by the plaintiff, who also employed them in the management of an apartment house he owned. Furthermore, the Kimbles did not have sufficient funds on deposit to cover the Kimble check. This fact was known by the plaintiff who gave the Kimbles his own check for a like amount to hold but who did not reveal these facts to the defendant.

The plaintiff was permitted to testify, over the defendant's objections, that he procured the Kimbles to act as straws on behalf of one Col. Thomas, who has since died. The plaintiff also testified that Col. Thomas never signed anything in connection with the Kimble contract and never deposited any earnest money in connection with it. However, over the defendant's objection, a listing card signed by Col. Thomas, whereby he listed certain property of his own with the plaintiff for sale on the basis of an exchange or trade at $50,000.00 or more, was admitted in evidence. The plaintiff further testified that although the Kimbles had been residents of the District of Columbia for some time, the plaintiff had them indicate on the Kimble contract that they were from Whitakers, North Carolina. The plaintiff also testified that in accepting the defendant's counter-offer of $77,500.00, the plaintiff himself signed the names of the Kimbles to the Kimble contract.

At the close of all the evidence, both parties moved for a directed verdict. The defendant's motion was denied, but the plaintiff's motion was granted, and judgment was en-accordingly.

In Tyssowski v. F. H. Smithy Co. (1910), 35 App. D.C. 403, 408, a broker who knew that a certain property could not be sold except subject to leases communicated an offer from a third person to the seller without telling the seller that the offer was conditioned upon the property being free from leases. Thereupon, the seller signed a commitment to sell the property with settlement to be had in sixty days. When the seller discovered that the buyer had not offer to buy and would not buy the property subject to the leases, the seller sued the broker for damages. The court held that the broker, by failing to reveal to the seller that the offer was conditioned upon the property being free from leases, had induced the seller to take the property off the market for sixty days, effectively giving the broker an exclusive listing for that period of time, and that such conduct was actionable.

In the instant case, the plaintiff, Reid, presented the Kimble offer to the plaintiff in conjunction with the plaintiff's signing the listing card sued on. Since the plaintiff had procured the Kimbles to act as straws, knowing but without revealing to the defendant that the Kimbles were neither ready, willing nor able to buy the defendant's property, and since there was no evidence that anyone had authorized the plaintiff to make an offer of $70,000.00 to the defendant — Col. Thomas' listing card only said something about $50,000.00 or more in exchange or trade; whereas, the $70,000.00 offer to the defendant made no mention of any exchange or trade — it is respectfully submitted that the jury, had the matter been presented to it for its determination, would not have been precluded, as a matter of law, from finding that the Kimble offer had been falsely contrived by the plaintiff solely for the purpose of inducing the defendant to give the plaintiff an exclusive listing either via the counter-offer signed by the defendant or via the listing card and, therefore, rendering a verdict in favor of the defendant. cf., Stein et al v. Treger (1949; rehear. den.), 86 U.S. App. D.C. 400, 182 F. 2d 696. However, in view of the fact that the plaintiff represented to the

defendant that the Kimble offer was secured by $5,000.00 earnest money, when the plaintiff knew that the Kimble check would have been dishonored if presented to the drawee bank for payment, it is respectfully submitted that, in view of the Tyssowski case, supra, such conduct, as a matter of law, precluded a verdict for the plaintiff.

It is respectfully submitted that a listing with a real estate broker is a unilateral contract, requiring acceptance by performance by the broker, whose performance may or may not constitute sufficient consideration to support the contract. The only evidence concerning the plaintiff's performance, other than as to his activities concerning the Kimble contract, which shall be discussed subsequently, was that he mailed copies of a brochure which he had prepared and published in pursuit of a prior listing on the same property to a few people whose names appeared on a list compiled by the plaintiff in the fall of 1961 in pursuit of the earlier listing. It is respectfully submitted that the plaintiff's mailing of the brochures to people to whom the brochure had been mailed in pursuit of the earlier listing did not constitute an acceptance of the exclusive listing of December 16, 1961, and that, even if it did constitute acceptance, it did not constitute sufficient consideration to support the agency contract upon which the plaintiff's claim is based. Huchting v. Rohn (Wis. -1922), 190 N.W. 847; Merten v. Vogt et al. (Ky. -1948), 208 S.W. 2d 739.

It is further respectfully submitted that once the plaintiff obtained the defendant's listing of December 16, 1961, he was estopped to claim any rights under the listing without either abandoning his efforts with respect to the Kimble contract or, preferrably, without making a full disclosure to the defendant that the Kimbles were merely straws and that the Kimbles did not have sufficient funds on deposit to cover their check. Whether or not the plaintiff was also obliged to reveal the identity of Col. Thomas is moot since the plaintiff not only never revealed to the defendant that the Kimbles were straws, the plaintiff overtly sought to conceal that fact from the defendant in identifying the Kim-

bles as being from Whitakers, North Carolina, instead of not mentioning where they were from or revealing that they were residents of the District of Columbia. At one time, it was held that one could not be an agent for the purchaser and an agent for the seller of the same time since the duties are incompatible and, therefore, a contract for such employment is void. Sunderland v. Kilbourn (1884; mod. Kilbourn v. Sunderland (1889), 9 S. Ct. 594, 130 U.S. 505, 32 L. Ed. 1005), 3 Mackey (14 D.C.) 506. It is conceded, however, that now, under certain circumstances, a real estate broker may be an agent for the purchaser and an agent for the seller at the same time; however, full disclosure by the broker to his principals is a sine qua non to the continuance of such an agency. Where such a broker conceals material facts from the seller, he thereby terminates his agency for the seller. Earll et al v. Picken (1940; motion to mod. den.), 72 App. D.C. 91, 113 F.2d 150; Harten v. Loffler (1908), 31 App. D.C. 362; Keith v. Berry et al (1949-Mun Ct. App. D.C.), 64 A.2d 300. Certainly the fact that the Kimble check would not have been honored by the bank, so that no earnest money secured the Kimble offer and the defendant's willingness to be bound by his counter-offer for at least a reasonable time unless and until revoked, was a material fact that the plaintiff should not have concealed from the defendant. Similarly, the fact that the Kimbles did not have the ability to perform under the terms of their offer and counter-counteroffers but were merely straws was a material fact that the plaintiff should not have concealed from the defendant. As to the materiality of the identity of the true purchaser, this Honorable Court is respectfully referred to the language in Mannix v. Hildreth (1894), 2 D.C.C 259, 277, where the court said:

> "Scarcely any man, when living his property with a real agent, stops to give details, either as to the property itself or as to the arrangements he desires to make, yet no one would sell upon equal terms to a first-class business man, and to an habitual drunkard, or well-

> known insolvent, and the ordinary man would not sell at all to a person whose very occupancy would tinge the neighborhood with a bad repute."

Furthermore, the plaintiff admitted that he signed the Kimbles names to the acceptance of the defendant's counteroffer. This point is not being raised to suggest any impropriety on the plaintiff's part. In fact, it would seem that Col. Thomas or the plaintiff could have signed the name of the Kimbles to the Kimble contract in view of the Kimbles' willingness to accommodate the plaintiff by acting as straws in the matter although, as testified by the plaintiff, no one other than the plaintiff and Col. Thomas knew of Col. Thomas' interest in the Kimble contract. Sorivi v. Baldi (1946-Mun. Ct. App. D.C.), 48 A.2d 462. However, it would seem that the plaintiff's signing of the Kimbles' names to the acceptance of the defendant's counteroffer, without the identity of the true purchaser being revealed and, particularly, without any evidence having been presented to show that Col. Thomas ever authorized the acceptance of the defendant's counteroffer, constituted the plaintiff, insofar as the defendant is concerned, one of the principals or one standing in the shoes of a principal contracting to purchase the defendant's property, it being well-settled that such is the position of an agent for an undisclosed principal. Robinson et al v. Beckley (1956), 97 U.S. App. D.C. 278, 230 F.2d 828.

In Wardman v. Washington Loan & Trust Co. (1937), 67 App. D.C. 184, 90 F.2d 429, it was held that where an agent accepted an option to purchase the seller's property, even though the agent never exercised the option, the option discharged any contract that the agent may theretofore have had with the seller for a commission arising out of a sale of the property. cf. Rawlings v. Collins (1910), 36 App. D.C. 72, where the undisclosed principal purchasing the property was an officer of the real estate company; also Jay et al. v. General Realties Co. (1946-Mun. Ct. App. D.C.), 49 A.2d 752. It is respectfully submitted that the plaintiff's conduct in this case, to which the plaintiff himself testified, ter-

minated any contract that the plaintiff may theretofore otherwise have had with the defendant for a commission arising out of the defendant's sale to the Chutters and that, therefore, the defendant was entitled to a directed verdict in favor of the defendant.

This Honorable Court held that the listing card on which the plaintiff's claim is based constituted an exclusive agency to sell the defendant's property. It is respectfully submitted that in the appeal after the first trial in Shea v. Second Nat. Bank of Washington (1942), 76 U.S. App. D.C. 406, 133 F.2d 17, the United States Court of Appeals for this circuit said at 76 U.S. App. D.C. 410, "it is well settled that an exclusive agent to sell is not entitled to a commission on a sale made by the owner unaided, in the absence of an agrement to the contrary." This Honorable Court, in recognition of the aforequoted passage from the Shea case, held that an agreement to the contrary is found in the paragraph of the listing card that states, "I also agree to pay said James E. Reid a commission of 5% in case sale is made during said period." It is respectfully submitted that the quoted paragraph merely defined the amount of the commission to be paid and did not, as would be required, unequivocally preclude the defendant from his inherent right to sell his own property unaided and without being required to pay the plaintiff a commission. South Florida Farms Co. v. Stevenson, 93 So. 247.

Despite Mr. Gill's testimony, which clearly showed that the defendant never gave Gill any listing on the property in question, that Gill acted only on behalf of the Chutters in presenting the Chutter offer and that the Chutter contract, with its offer, counteroffer and acceptance of the counteroffer, came into being on the very same day that Gill first requested the defendant's permission to show the Chutters the property in response to the Chutters' request, this Honorable Court held that the defendant was estopped to deny that Gill was his agent. It is respectfully submitted that it would seem from R. Harris & Co. v. Weller et al. (1922), 52 App. D.C. 6, 13, the defendant's agreement to pay Gill's commission would not estop the defendant from denying that Gill was his

agent. As to the fact that the Chutter contract expressly states that Gill was the defendant's agent, this Honorable Court's attention is invited to the fact that the Chutter contract is contained on a standard form patently prepared for Gill's exclusive use. It would seem that Gill's testimony was not excludable under the parol evidence rule; Bainum v. Wurster et ux (1958-Mun. Ct. App. D.C.), 140 A.2d 184; nor was there any attempt to have it excluded nor has there been any contention, as indeed there could not be, that the plaintiff relied in any way upon the Chutter contract's language so as to estop the defendant from denying that Gill was ever the defendant's agent. Consequently, the defendant cannot conceive of any basis upon which he should be estopped from such denial in any case, such as here, where neither Gill nor the Chutters are a party.

In view of what has been stated above, the defendant respectfully submits that the verdict and judgment entered for the plaintiff should be set aside and a judgment entered in favor of the defendant or, in the alternative, that a new trial be granted.

Respectfully submitted,

Alfred G. Graf
Attorney for Defendant

[Denied by fiat]

[Filed Feb. 14, 1966]

NOTICE OF APPEAL

Notice is hereby given this 14th day of February, 1966, that J. FRANCIS HARRIS, 3d, defendant, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 21st day of January, 1966 in favor of JAMES E. REID, plaintiff, against said J. FRANCIS HARRIS, 3d, defendant.

Alfred G. Graf
Attorney for Defendant

RELEVANT DOCKET ENTRIES

1966

Jan. 4	Verdict and judgment for plaintiff vs defendant in the amount of $3,680.00, with interest from January 22, 1962. (N) Holtzoff, J.
Jan. 14	Motion of deft to stay execution; M.C. 1/14/66 filed.
Jan. 14	Motion of deft to set aside verdict and judgment; P&A; Exhibits, #1, 2, 3, & 4; c/m 1/14/66 filed.
Jan. 20	Opposition by pltf to deft's motion to set aside verdict and judgment; P&A; c/m 1/17/66 filed.
Jan. 20	Opposition by pltf to deft's motion for a stay of execution; P&A; c/m 1/17/66 filed.
Jan. 21	Motion by defendant for stay of execution denied. (N) (fiat)
Jan. 21	Motion by defendant to set aside verdict and judgment denied. (N) (fiat)
Jan. 27	Withdrawal of motion by deft for a new trial per atty. filed.
Feb. 17	Order staying execution of judgment of January 4, 1966, until final disposition of appeal. (Order signed 2/16/66) (N) Holtzoff, J.
Feb. 17	Notice of appeal of deft, copy mailed to Friedlander & Friedlander, filed.
Feb. 17	Cost bond on appeal of Pltf in amount of $250.00 with National Surety Corp., approved, filed.
Feb. 17	Supersedeas bond of pltf in amount of $5,000.00 with National Surety Corp., approved and filed.
Feb. 18	Deposit by Alfred G. Graf of $5.00 for notice of appeal.
Mar. 9	Motion of deft for extension of time for filing transcript, stipulation for omissions and record on appeal and for docketing appeal; P&A c/m 3/8/66 filed.

Mar. 11	Consent Order extending time for filing transcript of testimony and stipulations for omission of papers from record on appeal until and including April 15, 1966, and extending time for filing and docketing the appeal until and including April 30, 1966. (N)
Apr. 13	Motion of deft for extension of time for filing transcript, stipulations for omissions and record on appeal and for docketing appeal; P&A's; c/m 4/13/66 filed.
Apr. 13	Consent Order extending time for filing transcript and stipulations for omissions on appeal to and including May 1, 1966; extending time for filing and docketing record on appeal to and including May 16, 1966. (N) Bryant, J.

TRIAL PROCEEDINGS
January 3, 1966

* * *

[8] THE COURT: Will counsel come to the bench, please, before you call your first witness.

(At the Bench:)

[9] THE COURT: Mr. Graf, I was looking at the pretrial order. The pretrial order states, among other things:

"Defendant asserts that the property was subsequently sold for $73,600, less a commission of five per cent, namely, $3,680, which was paid to the real estate broker who procured the purchaser."

MR. GRAF: Your Honor, we will prove that the real estate broker who received -- or we intend to prove that the real estate broker who received that commission was not Mr. Harris' agent, but the agent of the purchaser and had been the agent of the purchaser for many, many years in many transactions and particularly in this transaction.

THE COURT: Of course, you don't allege in the pretrial order that the defendant sold the property himself.

MR. GRAF: Your Honor, in that event I certainly would move to amend the pleadings.

THE COURT: And it states: Asserts that the property was subsequently sold for $73,600, less a commission of five per cent which was paid to the real estate broker who procured the purchaser.

Who procured the purchaser?

MR. GRAF: Your Honor, this is merely a matter of [10] an inartful statement. The purchasers were the clients of H. A. Gill & Son, had been for years. Mr. Gill returned to this country -- Mr. Chutter returned to this country from Turkey and asked Gill to find them a house of this type, that is, investment property.

THE COURT: In other words, you claim that the real estate broker was --

MR. GRAF: Was not the agent of Harris.

THE COURT: Was not the agent of Harris?

MR. GRAF: That is right, Your Honor.

THE COURT: I don't think it makes very much difference as to whether Harris sold the property himself or through a broker, except that at first blush your statement seemed to be inconsistent with the pretrial statement.

MR. GRAF: I'm sorry, Your Honor.

THE COURT: Very well, let's proceed, gentlemen.

* * *

JAMES E. REID

Plaintiff, called as a witness and, having been first duly sworn, was examined and testified as follows:

[11] DIRECT EXAMINATION

BY MR. FRIEDLANDER:

Q. Would you state your name and address, please? A. James

E. Reid, R-e-i-d. My address is 160 Dunbar Road, Palm Beach, Florida.

Q. And directing your attention to 1961 and 1962, what was your occupation? A. A real estate broker.

Q. And were you a licensed real estate broker in the District of Columbia? A. Yes.

MR. GRAF: I object, Your Honor, on the grounds that this witness is not competent to state whether he was licensed or not.

THE COURT: Objection sustained. I think the license has to be produced.

* * *

[13] Q. Now, Mr. Reid, in 1961 were you familiar with the property at 2620 P Street, Northwest in Washington, D.C.? [14] A. Yes, I was.

Q. And would you describe that property? A. It's a small apartment building in Georgetown consisting of four or five apartments.

Q. Were you familiar with the owners of that property? A. Yes.

Q. And did you know who they were? A. Yes.

Q. In the first part of December 1961, did you have any conversations with the owners of that property? A. Yes.

Q. Was one of the owners the defendant, Mr. Harris? A. Yes.

Q. Did there come a time in December 1961 where there was a change of ownership? A. Yes.

Q. Can you fix the date?

* * *

A. The change in ownership came about approximately [15] sometime around 12 or 13 or 14 of December.

Q. 1961? A. Yes.

Q. And who became the sole owner of this piece of property? A. Mr. J. Francis Harris.

Q. He is the defendant here? A. Yes.

Q. Did there come a time when the defendant and you met to discuss a listing? A. Yes.

Q. In December? A. Yes.

Q. Can you tell us where this conversation took place? A. It was in my apartment on 24th Street, Northwest.

Q. Who was present? A. Mr. J. Francis Harris and others.

Q. In this conversation was there prepared and executed a listing agreement? A. Yes.

* * *

[16] Now I show you a document and ask if you can identify this document? A. Yes.

Q. What is that document? A. This document is a listing card and it is dated 16 December, 1961, and it authorizes --

THE COURT: Don't tell us the contents of it. All we want is to have you identify it.

THE WITNESS: Yes, I recognize it.

MR. FRIEDLANDER: Would you mark this for identification?

THE DEPUTY CLERK: Plaintiff's Exhibit No. 1 marked for identification.

* * *

BY MR. FRIEDLANDER:

Q. Mr. Reid, this card, was it written out at that time? A. Yes.

Q. Who wrote the card? A. J. Francis Harris, 3rd.

[17] MR. FRIEDLANDER: Your Honor, I wish to offer into evidence Plaintiff's Exhibit 1.

MR. GRAF: No objection.

THE COURT: Let it be admitted.

* * *

[18] Q. I show you a document and ask you if you can identify this document? A. Yes.

* * *

[19] Q. It's a certificate from the Real Estate Commission? A.

It is a certificate from the Real Estate Commission signed by Mr. William Downing, Secretary, and notarized.

MR. FRIEDLANDER: May this be marked for identification No. 2?

* * *

MR. FRIEDLANDER: Your Honor, I wish to offer that document into evidence.

THE COURT: What is it?

MR. FRIEDLANDER: The certification from the Real Estate Commission that Mr. Reid was a licensed real estate broker in 1961.

THE COURT: Let it be admitted.

* * *

[20] BY MR. FRIEDLANDER:

Q. Mr. Reid, after receiving the listing, which is Plaintiff's Exhibit No. 1, what did you do with respect to this piece of property? A. At the time I received the exclusive listing on December 16, I had 30 or 35 prospective clients listed. These clients I had obtained from numerous advertising and I was contacting them continuously. And I also had one person that I was concentrating on for the purchase.

Q. I show you a booklet or a document and ask if you can identify this document? A. Yes, I can.

Q. Tell us, without telling us the contents of it, what this document is? A. Well, this is what is known in the real estate business as a brochure, containing the description of the property offered for sale, the income, the expenses, and all pertinent information relative thereto.

[21] * * *

Q. This brochure had to do with the property 2620 P Street? A. Yes, sir.

Q. And who prepared this document? A. I prepared it.

* * *

Q. In August or September of 1961 did you have any listing on this property? A. Yes, I did.

Q. And was this listing from different owners? A. This listing which I had was from one of the two owners at the time.

* * *

[22] Q. And after December 16, 1961, what did you do with this document or copies of this document? A. On any inquiry that a prospective purchaser wanted, I would mail that to the prospective purchaser and, in turn, would communicate with him by telephone, if he was interested.

Q. What was the type of property that you were selling? A. It was known as commercial investment property.

Q. And in what way was it commercial investment property? A. In that it had apartments on a rental basis and it was not known as residential, it was for rental purposes only.

* * *

[25] Q. Your activities with respect to 2620 P Street continued to what date, sir? A. They continued up until the early part of January.

Q. And what, if anything, took place in the early part of January? [26] A. Mr. Harris informed me, when I visited his home, that he had already sold the property and had a contract on it from some other broker.

* * *

MR. FRIEDLANDER: Your Honor, by agreement with counsel I will offer Exhibit 5 into evidence with the stipulation of counsel that the price, the sale price on this piece of property was $73,600.

THE COURT: But what is Plaintiff's Exhibit 5?

Identify it so that we know what it is.

MR. FRIEDLANDER: It is a deed from the owner Harris to Mr. Chutter dated 11 January, 1962.

* * *

[27] CROSS EXAMINATION

BY MR. GRAF:

Q. Mr. Reid, can you identify this document, please?

THE COURT: First have it marked for identification so we have a record of what is being shown to the witness.

[28] THE DEPUTY CLERK: Defendant's Exhibit No. 1 marked for identification.

* * *

[29] BY MR. GRAF:

* * *

Q. Will you please identify the document that has been marked Defendant's Exhibit 1 for identification? A. This is a copy of a contract form, which is the property in question, which was owned by Mr. Harris, and there are offers on this contract and there is also a counter-offer [30] typed on the rear.

Q. Can you tell us who prepared that contract? A. I prepared it.

Q. And can you tell us when you prepared it? A. I prepared this contract on the 9th of December or maybe the day before.

Q. And whose name did you put on that contract as the purchaser? A. The name of the purchaser on this contract is Jerry B. Kimble and Minnie B. Kimble.

Q. Did you ever present that contract to Mr. Harris? A. Yes, I did.

Q. And when was that? A. It was on two occasions. This contract dated December 9 was presented to Mr. Harris in my apartment on December 16 and was also presented at a later date in the earlier part of January 1962.

MR. GRAF: Please mark this for identification.

THE DEPUTY CLERK: Defendant's Exhibit No. 2 marked for identification.

* * *

BY MR. GRAF:

Q. What relationship, if any, did you have with [31] Jerry B. Kimble on December 16, 1961? A. Formerly he was my janitor over a period of several years.

Q. How about on December 16, 1961? A. He lived in the building which I used to own and was a janitor for the owners at that time.

Q. When did you sell that building, sir? A. I sold the building in 1964.

Q. Well, isn't it true that he was working for you as a janitor in 1961? A. Yes, it is, in 1961 he was employed by me as a janitor.

Q. And when you first submitted that contract to Mr. Harris, what amount was on the face of that contract as a purchase price? A. $70,-000.

Q. To your knowledge, did Mr. or Mrs. Kimble have $70,000? A. No, they did not.

Q. Had Mr. Kimble signed that contract before you presented it to Mr. Harris on the 16th of December 1961? A. Yes.

Q. I show you what has been marked as Defendant's [32] Exhibit No. 2 for identification and ask you to please identify that, if you can, sir? A. This is a check in the amount of $5,000 signed by Minnie Kimble and Jerry Kimble, as a deposit check on the contract.

Q. Made payable to whose order? A. It is made payable to the Reid Realty Company.

Q. Who filled out Reid Realty Company and the amount on that check? A. I filled it out.

Q. And Mr. Reid, when you presented the Kimble contract, Defendant's Exhibit No. 1 for identification, to Mr. Harris, did you also present the Kimble check for $5,000? A. Yes.

Q. Did the Kimbles come to you and ask to buy the property? A. No, they did not. They were acting merely as a straw party.

Q. Did the Kimbles volunteer their check for $5,000? A. No, I

asked them if they would sign the check as a straw party, and they agreed.

* * *

[33] Q. And did the Kimbles, to your knowledge, did the Kimbles have $5,000 in any bank at that time? A. No, they did not.

Q. To your knowledge, did the Kimbles have $5,000 at all? A. No, they did not.

Q. When you presented the Kimble contract to Mr. Harris, what was his response, if any? A. He said the price was too low.

Q. And this was on December 16, 1961? A. Yes.

Q. And what, if anything, happened then with respect to the Kimble contract? A. I had my secretary there and I was doing some other work, and Mr. Harris and a young lady by the name of Miss McGuire was there present and Mr. Harris said that he was prepared to make a counter-offer, and we had my secretary, Miss Williams, type up a counter-offer on the reverse side.

Q. And what was the amount of that counter-offer? A. Seventy-Seven, five. And he signed the counter-offer in my presence and in the presence of others there.

[34] Q. Did you give Mr. Harris the check or did you retain the $5,000 check from the Kimbles? A. Well, it's customary to retain the check because this was merely a counter-offer and there was no acceptance whatsoever.

Q. Did you retain it? A. Yes, I did.

Q. Did you retain it at all times until after that lawsuit was filed? A. Yes.

Q. You never presented the check for collection? A. No, I did not. There was no necessity to present it.

THE COURT: Was this before or after the listing card, Plaintiff's Exhibit 1, was signed?

THE WITNESS: It was at the time of the signing of the listing card, which was December 16, but I had a previous listing card signed by Mr.

Harris previous to December 16. There is more than one listing card, Your Honor, involved in this case.

* * *

BY MR. GRAF:

Q. Did there come a time, after December 16, 1961, [35] when Mr. or Mrs. Kimble -- when you again asked Mr. or Mrs. Kimble to sign the Kimble contract? A. No. Well, -- yes, they endorsed it after December 16th.

Q. When you say they endorsed it, what do you mean, sir? A. They endorsed it for a larger amount than which originally appeared on the face of the contract.

Q. You mean they made a third proposal? A. That is correct.

Q. And that proposal was $75,000 all cash, wasn't it, sir? A. That is right, yes.

Q. And either Mr. or Mrs. Kimble signed the contract to that effect, isn't that correct? A. That is correct.

Q. And what, if anything, did you do with the Kimble contract then? A. What do you mean by then?

Q. After Mr. or Mrs. Kimble signed, saying that they would purchase at $75,000 all cash? A. I had been communicating with Mr. Harris on the telephone and he said that he would not accept. I told him I had an endorsement from the purchaser, proposed purchaser [36] in the amount of seventy-five, and he said no, that was not enough, I want seventy-seven, five.

Q. When was the last time such conversation took place between you and Mr. Harris? A. The last conversation I had with Mr. Harris concerning this contract was at his home in the early part of January 1962.

MR. GRAF: At this time, Your Honor, we would like to offer Defendant's Exhibits 1 and 2 for identification into evidence.

* * *

MR. FRIEDLANDER: Your Honor, I would object to these documents as not being relevant to the case.

THE COURT: I am going to ask counsel to come to the bench before I rule on this.

(At the Bench:)

THE COURT: Mr. Graf, on what theory is this relevant?

MR. GRAF: It is our contention that Mr. Reid breached the agency agreement when he presented the Kimble contract knowing that the Kimbles were not bona fide purchasers, were not intended as purchasers, in fact they had been procured by him as straws.

[37] THE COURT: Straws for somebody else. Well, there is nothing wrong --

MR. GRAF: There is no testimony to that, yet, Your Honor, there is no testimony, no evidence as to that.

THE COURT: I am going to admit this. I will overrule the objection.

Of course, I presume you will come forward with evidence to show who the principal back of the straws was. You better do that because otherwise there is a very serious inquiry.

MR. FRIEDLANDER: Your Honor, this contract was the subject matter of the counterclaim, and the jury has ruled --

THE COURT: Yes, the jury found in your favor on the counterclaim, but that doesn't mean it can't be used as a defense.

MR. GRAF: Absolutely.

THE COURT: There is a big difference between a defense and a counterclaim.

In other words, I take it that what the defendant is trying to show, I am not sure that he will succeed, but what the defendant is trying to show is that the plaintiff was not performing in good faith; is that it?

[38] MR. GRAF: Precisely, Your Honor. I go beyond that point. I say not only wasn't he performing in good faith, but in any event, even if there was another undisclosed principal besides himself, even if

there was a third party who was the undisclosed principal, he owed the duty to the defendant not to have undisclosed principals.

THE COURT: Oh, no, straws are used constantly, provided he revealed who the purchaser was.

MR. GRAF: Right. But he's got to reveal it.

* * *

[39] BY MR. GRAF:

Q. Mr. Reid, did you ever receive any other contract in writing, from any source whatsoever, pertaining to the property 2620 P Street? A. No.

Q. Did you ever receive a deposit from anyone whomsoever, other than the Kimbles, with respect to 2620 P Street Northwest? A. Well, if I didn't have a contract there wouldn't be any necessity for a deposit.

Q. Isn't it also true that there came a time when you signed Mr. or Mrs. Kimbel's name to this contract? A. Yes, under their authority.

Q. And isn't the part under which you signed their names the following: "We, Minnie Kimble, my husband, do hereby agree to increase our purchase price to your asking price of $77,500," isn't that the part you signed?

* * *

A. That is right, yes.

* * *

[40] Q. Mr. Reid, whose idea was it to put down Whitakers, North Carolina as the place from which the Kimbles came? A. It was mine.

Q. It was your idea? A. Yes.

Q. Were you ever a mortgage banker? A. No, but I have done a considerable amount of mortgage.

Q. Is the following in your handwriting:

"We are pleased with this loan. James E. Reid, mortgage banker, 1133 Twenty-Fourth Street." A. That is my handwriting, yes.

Q. What loan were you pleased with, Mr. Reid? A. I was pleased with the loan that I had not firmly been committed on, but a loan that I had obtained on this particular property.

Q. With respect to Mr. and Mrs. Kimble? A. No.

Q. Well, now, did you mean by that that you were making [41] a loan, that is, borrowing the money, or you were lending the money? A. No, I was just obtaining a loan commitment.

Q. Now, Mr. Reid, when you received the $5,000 check from Mr. Kimble, isn't it true that you also gave him a $5,000 check? A. Yes, that is correct.

Q. And that was a personal check signed by you? A. That is correct.

Q. And isn't it true that you told him that you didn't have $5,000 in the bank? A. No, I did not tell him that.

Q. Was that check good at that time, sir? A. Yes, it was.

THE COURT: It was?

THE WITNESS: Yes.

BY MR. GRAF:

Q. May I ask, sir, what bank it was drawn on? A. American Security & Trust.

Q. Did you ever receive that check back, sir? A. Yes.

* * *

[42] Q. When did Mr. Kimble return it to you, sir? A. It was after Mr. Harris had sold the property. There was no necessity for him to hold the check.

Q. What necessity was there for you to hold Mr. Kimble's check? A. Because if the contract with Mr. Harris had been signed and finalized or became binding, then the check would have been cashed and I would have made it good.

* * *

[43] Q. Mr. Reid, after you had signed the Kimbles' name to that portion which says, "We, Minnie Kimble, my husband, do hereby agree

to increase our purchase price to your asking price of $77,500," did you deliver this contract to Mr. Harris? A. Yes, I did.

* * *

REDIRECT EXAMINATION

BY MR. FRIEDLANDER:

Q. Mr. Reid, who was the straw -- who was the principal for whom the Kimbles were straws?

MR. GRAF: I object, Your Honor.

[44] THE COURT: On what ground? I will hear you on that.

MR. GRAF: Thank you, Your Honor.

Mr. Reid has already testified that he received no contract in writing from anyone; he has testified --

THE COURT: He has a right to state who these so-called straws represented. You see, this involves his good faith.

Objection overruled.

MR. GRAF: May I just make one point, Your Honor?

THE COURT: I think you better come to the bench.

(At the Bench:)

MR. GRAF: Your Honor, I have subpoenaed the Kimbles here. They are here in the court, they are here as witnesses. If it's a question of who they were straws for, I --

THE COURT: I don't care about that. I have to pass upon the admissibility of any question at the time the matter arises. What other testimony there is going to be, I can't consider.

Objection overruled.

(In open Court:)

THE COURT: Will the reporter please read the pending question?

[45] (The reporter read the question as follows:

"Mr. Reid, who was the principal for whom the Kimbles were straws.")

THE WITNESS: It was a friend of mine and his name was Colonel J. Thomas.

BY MR. FRIEDLANDER:

Q. And Mr. Thomas was in what business? A. He was in the Air Force, active duty.

Q. And where is Colonel Thomas now? A. He is dead.

Q. Who secured the straws for Colonel Thomas? A. I did.

Q. And what was the relationship, if any, between -- at that time, between Colonel Thomas and the defendant Harris? A. There was a very strained relationship at that time between Colonel Thomas and --

MR. GRAF: I object.

THE COURT: Finish your answer.

THE WITNESS: The relationship between Colonel Thomas and the defendant J. Harris was very strained at that particular time and Colonel Thomas did not want to deal with Mr. Harris.

MR. GRAF: I object, Your Honor, and move that the [46] answer be stricken.

THE COURT: Objection overruled.

BY MR. FRIEDLANDER:

Q. The contract which is Defendant's Exhibit 1, was this discussed on -- this was discussed on how many occasions with Mr. Harris? A. First it was discussed with Mr. Harris on December 16 and then it was discussed over the telephone with Mr. Harris several times after that, and the last time I took the contract to his home in the early part of January 1962.

Q. On that occasion what was said by Mr. Harris about this contract or any other contract? A. When I came into his home I told him that I had a contract, and he laughed at me and said that he had already sold the property and he showed me a piece of paper which appeared to be a contract.

Q. Did you read it? A. I did not read the contract which he had.

And he refused to discuss the contract which I had in my pocket and I was going to submit to him.

* * *

[47] BY MR. FRIEDLANDER:

Q. What was your arrangement with Colonel Thomas at that time? A. My arrangement with Colonel Thomas at this particular time, that is, during December 1961, Colonel Thomas was interested in buying investment properties and he also was interested in disposing of a small property which he had on O Street.

Q. I show you a document and ask if you can identify this document? A. Yes, this is a listing card for the property which [48] I just mentioned, located at 3020 O Street, Northwest.

Q. Who was the listing card from? A. This property was owned by Colonel J. Thomas and it was signed by Colonel J. Thomas, authorizing me to sell this property for $50,000.

* * *

MR. FRIEDLANDER: Your Honor, I wish to have marked and to offer into evidence the card, which would be No. 6 for the plaintiff.

MR. GRAF: I object to the admission of the document as being irrelevant and immaterial.

THE COURT: On what theory is this relevant?

MR. FRIEDLANDER: On the question of the agency, that is, the purchase by Colonel Thomas of the property which is described in the Kimble contract put into evidence by the defendant. The testimony has been that --

[49] THE COURT: You don't have to reiterate or summarize the testimony. But, unfortunately, this is a blank card with a signature.

MR. FRIEDLANDER: The back, Your Honor.

THE COURT: Is there something on the back?

MR. FRIEDLANDER: It describes the property.

THE COURT: But this relates to another property, 3020 O Street.

MR. FRIEDLANDER: Yes, Your Honor, it is the condition on the face which required that the property be traded, that is, that the Colonel buy a piece -- on the front it says that it is conditioned on a trade, which was that a piece of property --

THE COURT: I see. I will admit that.

Objection overruled.

* * *

[50] BY MR. FRIEDLANDER:

Q. Showing you Plaintiff's Exhibit No. 6 and calling your attention to the wording on the bottom, what was the arrangement, what was it that you were supposed to do?

* * *

BY MR. FRIEDLANDER:

Q. Mr. Reid, would you read what is written there and then --

* * *

THE WITNESS: Colonel Thomas, by virtue of this listing card, submitted the property for me to sell, which is known as 3020 O Street, listed on the reverse side.

Now, the purchase price that he hoped to get [51] was $50,000. However, Colonel Thomas, who at this time owned this property, did not want to sell it unless he could purchase a larger property simultaneously or approximately the same time.

Now, the reason why --

MR. GRAF: I object.

THE COURT: You may not interrupt. You have a right to move to strike after the answer is finished, but please don't interrupt.

THE WITNESS: Now, the reason for Colonel Thomas putting on this card conditional --

THE COURT: Don't tell us any reasons. Tell us what he said to you and what you said to him.

THE WITNESS: Colonel Thomas -- I am repeating, but I will say it again -- would not sell this property --

THE COURT: Tell us what he said to you.

THE WITNESS: He said he would not sell this property unless he could buy a larger property at the same time; and what he had in mind --

THE COURT: Don't tell us what he had in mind. Tell us what he told you.

THE WITNESS: He told me he wanted to effect a trade, that is, buy and sell about the same time and thereby avoiding paying a large tax which he would have to pay on [52] 3020 O Street.

* * *

RECROSS EXAMINATION

BY MR. GRAF:

Q. Mr. Reid, you testified that Colonel Thomas had ill feelings toward Mr. Harris, is that correct? A. Yes.

Q. At the time of the Kimble contract? A. Yes, that is correct.

* * *

[53] Q. When you stated that Colonel Thomas didn't want to deal with Mr. Harris, you didn't mean, did you, that he didn't want to buy property from Mr. Harris? A. I didn't mean anything by that, no. I meant that his relationship with Mr. Harris at this time was not on the best and was rather strained, I would say.

Whether he would buy property from Mr. Harris, I don't know, but he came to me, he did not go directly to Mr. Harris.

Q. He came to you? A. That is correct.

Q. And did you ask him to sign a contract or a proposal of a contract? A. No, I did not. He wanted me to purchase the property or submit a contract in a straw name and not to divulge his interest therein. Those were his specific intentions.

Q. Now, the frequent telephone calls that you made to Mr. Harris after submitting the Kimble contract, were they on behalf of Colonel Thomas? [54] A. You might say that they were on behalf of his interest because the straw -- while the straw names appeared thereon, it was essentially and primarily Colonel Thomas who was interested in purchasing this property.

Q. It is also true, is it not, that Colonel Thomas didn't give you

any deposit with respect to this property? A. No, he did not, but he was willing and ready to put up the $5,000 if and when it was accepted.

MR. GRAF: Your Honor, I move that that answer be stricken as not being responsive.

THE COURT: Motion denied.

BY MR. GRAF:

Q. Mr. Reid, did you abide by Colonel Thomas' wishes as expressed to you in all respects with regard to the Kimble contract? A. Sir, I don't quite understand your question.

Q. Colonel Thomas asked you to submit a contract in the name of straws, is that correct? A. That is correct.

Q. And in response to that request you asked Mr. and Mrs. Kimble to sign the contract that has been marked Defendant's Exhibit 1 for identification, is that correct? A. That is correct, yes.

[55] Q. And in conjunction with that request you also requested the Kimbles to give you their check for $5,000, which is marked Defendant's Exhibit 2 for identification, is that correct? A. Yes.

Q. And Colonel Thomas had asked you to keep his identity undisclosed as far as Mr. Harris is concerned? A. As far as anyone was concerned.

Q. Sothat the Kimbles didn't know that Colonel Thomas was the undisclosed principal, either, is that correct? A. No, I did not disclose his name or his interest to anyone.

Q. Now, will you tell us again why you had Mr. and Mrs. Kimble identify themselves as being from Whitakers, North Carolina instead of from 1133 Twenty-Fourth Street, Northwest, Washington, D.C.? A. I believe I have already answered that question, but if you want me to repeat it, I shall.

Q. Please, sir.

* * *

[56] THE WITNESS: I have already answered that there was no particular reason except that I did not want Mr. Harris to have any ink-

ling that Colonel Thomas was interested. He knew that the Kimbles were straws.

BY MR. GRAF:

Q. But you say he didn't know who the Kimbles were straws for? A. No, that is correct.

[57] Q. And this was information you wanted to keep from him? A. That is right.

Q. And you don't know whether Mr. Harris would have been willing to sell to Colonel Thomas, do you, sir? A. Yes, I do. Even if they were straws, he would have sold it to the Kimbles or to anyone else as long as the price was right.

Q. Are you saying, sir, that Mr. Harris would have sold this property to Colonel Thomas in December of 1961 or January of 1962? A. He would have, yes, if he had the right price.

* * *

Q. That was a price that he put down as a counter offer, wasn't it, $77,500? A. Yes, that is a counter offer. That is the price [58] that he was willing to take.

Q. And isn't it true, sir, that that was the price that Colonel Thomas was willing to pay? A. Yes.

Q. Sir, do you have anything in writing from Colonel Thomas pertaining or identifying the property at 2620 P Street, Northwest? A. No, I don't have anything in writing other than the listing card which has some relation to this property, the listing card which was just submitted.

Q. Isn't it true, sir, that the address 2620 P Street, [59] Northwest does not appear anywhere on that listing card? A. I didn't say it did, no.

Q. The name Harris doesn't appear anywhere on that listing card, either? A. No, I didn't say it did, and it doesn't.

Q. A four-apartment one office building doesn't appear anywhere on that listing card, either, does it? A. No.

Q. And the only association that you have besides what Colonel Thomas told you, is the fact that Colonel Thomas wanted fifty thousand or above, conditioned on a trade? That is the only documentary evidence you have to tie this land, namely, Harris' land in with Colonel Thomas, is that correct? A. Well, that condition on trading there had a relationship to the purchase of the Harris property.

Q. But in writing, sir? A. I have already testified I have nothing else in writing.

* * *

[60] Q. On the Kimble contract, Defendant's Exhibit 1, there is printed, is there not, "The seller agrees to pay to James E. Reid (and cooperating broker)" doesn't that appear there? A. Yes, it does.

* * *

Q. Was there any cooperating broker with respect to the Kimble contract? A. No, but it was anticipated that there would be one.

* * *

MR. FRIEDLANDER: May it please the Court, this is [61] my last witness.

I would like to read from the testimony of the defendant, one page, and to put into evidence one exhibit.

THE COURT: Very well.

* * *

MR. FRIEDLANDER: The transcript of Monday, October 18, 1965.

* * *

[62] THE COURT: You said you only wanted one page.

MR. FRIEDLANDER: I'm sorry. The five sentences on page 38 and the balance of page 65.

THE COURT: Very well, let me see it.

Now, whose testimony is it? Why don't you state for the record, so there will be a record, that you want to read the testimony of John Jones or John Smith, or whose testimony.

MR. FRIEDLANDER: I want to read the testimony of J. Francis Harris, the defendant.

THE COURT: Very well. Given on what date?

MR. FRIEDLANDER: On October 18, 1965.

* * *

[63] THE COURT: Very well, you may read that.

MR. FRIEDLANDER: From page 38:

"Q. Now, Mr. Harris, I show you the contract marked Plaintiff's Exhibit 8, between yourself and Mr. and Mrs. Chutter, and ask you when it was that you first saw that contract?

"A. Mrs. Helfenstein brought it to my home on the 6th of January, 1962."

Then on page 65 of that same hearing, October 18, 1965 --

THE COURT: The first page was what number?

MR. FRIEDLANDER: Page 38; and the next page, Your Honor, is page 65 and beginning with line 7:

"Q. Mr. Harris, you received the Chutter contract from Mrs. Helfenstein on the 6th of January, 1962, is that correct, sir?

"A. Yes.

"Q. When did you return it to Mrs. Helfenstein?

"A. I think it was the following day.

"Q. On January the 7th, 1962?

"A. January 7th.

"Q. Now, the reverse side of that Chutter [64] contract bears the date 6 January, 1962 alongside your signature. Can you tell us why you didn't return the contract to Mrs. Helfenstein sooner, if there was any reason at all?

"A. I wanted to read it and look it over. I think she gave it to me the late afternoon of the 6th.

"Q. And she didn't return, then, until the next day, is that it?

"A. She didn't come back until the following day, and I remember

correctly, I gave it to her. I brought it up to Mr. Gill's office and left it there for her to pick up."

That is the part of the transcript.

I wish to offer into evidence, which would be Plaintiff's Exhibit 4 for identification, which was Plaintiff's Exhibit 8 identified by Mr. Harris.

* * *

[65] THE COURT: Let it be admitted.

* * *

MR. GRAF: May it please the Court, Mr. Friedlander and I had stipulated that the Chutter contract was entered into on the 6th of January, 1962.

* * *

[67] JOHN W. GILL

called as a witness by the defendant and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GRAF:

* * *

Q. What is your business or profession? A. I am a real estate broker.

* * *

[68] Q. Trading under what name? A. H. A. Gill & Son.

Q. Mr. Gill, among your clientele do you, or did you have a client by the name of Chutter, Reginald Chutter? A. Yes, I did.

* * *

Q. How long has Mr. Chutter been doing business with your company? A. Mr. Chutter, of course, died, I guess, about a year ago. He did business with us four or five years previous to his death.

Q. In other words, back in about 1956, '57 would you say? A. No,

I think it was later than that. I think he probably started doing business with us approximately 1959.

[69] Q. When you say he started doing business with you, what was the nature of the business that he did with your company? A. We sold houses to him and for him.

Q. And did you at any time manage any properties for him? A. Yes, we did.

Q. Directing your attention to the period of December 1961, did you at that time have a listing card from Mr. J. Francis Harris pertaining to 2620 P Street, Northwest? A. Not to the best of my knowledge.

* * *

[70] Q. Mr. Gill, around November or December 1961, did Mr. Chutter come to your office or ask your office concerning a purchase of some real property? A. Yes.

Q. And can you tell us when that was? A. I think it was around December, I believe. He had returned from an overseas assignment and he contacted one of our agents and said that he was interested in investing in some Washington real estate and he preferred Georgetown.

Q. And what, if anything, did your company do with respect to Mr. Chutter's wishes? A. Well, one of our agents, Mrs. Helfenstein, showed him a number of properties.

Q. Did one of those properties include 2620 P Street, Northwest? A. Yes, it did.

* * *

[71] Q. But he did, in fact, purchase 2620 P Street through your company, isn't that correct? A. Yes, he did.

Q. Was there any cooperating broker involved in that transaction? A. No, there was not.

Q. In other words, with exception of your company, to your knowl-

edge, with exception of your company there was just Mr. Harris and the Chutters? A. Yes.

* * *

[75] CROSS EXAMINATION

BY MR. FRIEDLANDER:

Q. Mr. Gill, I show you Plaintiff's Exhibit No. 4. Is that the contract from your company? A. Yes, it is.

Q. And that was a contract executed at least by the purchaser on the 6th day of January, 1962? A. Yes.

Q. Did you ever have a listing from Mr. Harris to show this property? A. To the best of my knowledge, we didn't. I didn't actually handle this case.

* * *

Q. And did Mr. Harris -- when did Mr. Harris first [76] contact your office with regard to selling this piece of property? A. I can only tell you what's been told to me by Mrs. Helfenstein as to what happened.

Q. Well, do you have a date? Do you know what date it was? A. As I understand, it was January 6th, 1962 was the day that Mrs. Helfenstein and Mr. Harris were in contact with each other concerning showing the property.

* * *

Q. Did your office have a key to look inside the property? A. I understand that Mrs. Helfenstein got a key from Mr. Harris.

Q. Sometime prior to January 6th, the date of execution of the contract? A. I don't believe so.

Q. Were you advised by -- you or your office, advised by Mr. Harris that there was an exclusive listing given to Mr. Reid of Reid Realty? A. No, I was not.

[77] Q. Was any statement made to you or your office by Mr. Harris with respect to a listing, an exclusive listing by any other real estate agent? A. Not to my knowledge.

Q. Was any inquiry made by you or anyone in your office as to whether or not there were any other brokers interested in the transaction?

* * *

THE WITNESS: Not to my knowledge.

* * *

[78] Q. Mr. Harris, was he known to you as a real estate broker, himself? A. Yes, he was.

Q. And did you discuss this property at all with Mr. Harris? A. Not to my knowledge.

Q. From what source did you or your office get the information about the number of apartments and the price of the property and so forth? A. I understand that Mrs. Helfenstein got the information from Mr. Harris.

Q. And did you keep some record, some card or this information [79] in your office? A. No, we didn't.

* * *

Q. Did you have this information, no matter where you kept it, is that correct? A. As I understand it, Mrs. Helfenstein knew Mr. Harris.

THE COURT: Who was she?

THE WITNESS: Mrs. Helfenstein was an agent for our office, was a sales --

THE COURT: An employee of your office?

THE WITNESS: Yes, a sales agent.

BY MR. FRIEDLANDER:

Q. And she had gathered this information? A. From Mr. Harris, yes.

Q. And was this information given to her or gathered by her prior to the date of the contract, namely, January 6, 1962? [80] A. I understand everything was done in that one day. I believe it was a Sunday.

That is why I was not involved in it. That she talked to Mr. Harris and that he gave her the information about the price and the financing and the number of units, et cetera, and he told her she could pick up the keys and show the property on that particular day. The whole transaction took place on that one particular day, which is the date of the contract.

Q. And on that day, or, rather, two days later, did you then order title on the property? A. Our office probably did.

* * *

Q. I show you this document and ask if that is a letter from your office ordering settlement? A. Yes, it is.

MR. FRIEDLANDER: May I have it marked for identification as Plaintiff's 7?

THE DEPUTY CLERK: Plaintiff's Exhibit No. 7 marked for identification.

* * *

[81] REDIRECT EXAMINATION

BY MR. GRAF:

Q. Mr. Gill, the Chutter contract, which is Plaintiff's Exhibit 4, I believe, that was written on the form that your company usually uses, isn't that correct? A. Yes, it is.

Q. This is a form that was printed up particularly for your company? A. Yes. It's actually a standard Law Reporter Form but we put our name at the top.

Q. And you use the same form regardless of whether you are commissioned by a purchaser to go out and buy a piece of property for him or commissioned by a seller to sell a piece of property for him, is that correct? A. That is our standard sales contract.

Q. Who was it in your office that had been dealing with the Chutters during the years previous to December 16 -- to January 6th, 1962? A. Mrs. Helfenstein.

Q. In other words, the Chutters were Mrs. Helfenstein's clients, so to speak?[82] A. Yes.

* * *

[83] (The jury withdrew from the courtroom.)

THE COURT: Are there any motions, gentlemen?

MR. FRIEDLANDER: No, Your Honor, I have no motions at this time.

MR. GRAF: Yes, Your Honor. At this time the defendant renews his motion for a directed verdict on several grounds:

First, that the evidence uncontrovertedly shows that the Gill Company was operating on behalf of the Chutters. Therefore, Mr. Harris' sale to the Chutters was a sale made by himself.

THE COURT: Suppose it was, what then?

* * *

[86] Now, what other grounds do you have besides this one? You said you had several grounds.

MR. GRAF: The second ground that I would have is that the relationship between Harris and Reid was that of principal and agent, and the law holds that the agent is obligated to his principal --

THE COURT: You mean you submit that the law holds. Don't be so authoritative.

MR. GRAF: I submit, Your Honor, that an agent --

THE COURT: Tell me briefly what your grounds are. I will hear your further argument in the morning.

MR. GRAF: -- owes the duty to his principal to fully disclose developments as they go along.

THE COURT: I don't think there has been any violation of that duty here.

* * *

[97] MR. GRAF: Thank you, Your Honor.

THE COURT: Now I will hear the other side.

* * *

[99] MR. FRIEDLANDER: On the question of whether or not under the exclusive listing the owner may sell and preclude the agent from his commission, where the owner may sell, himself.

There have been many decisions that have held that is correct, the owner may sell. In this jurisdiction, aside from the Shay case, the one case that I could find where the language of the exclusive agreement was identical or virtually identical to our language was a case that came from the District of Columbia Court of Appeals, or then the Municipal Court of Appeals, which I submit to Your Honor is squarely on this point and where the Court there said that, using this language the exclusive right to sell and to pay to the agent the regular commission in case a sale is made during the period, if the sale is made during the period, would have qualification as to who made the sale, the agent is entitled to his commission.

* * *

MR. FRIEDLANDER: That is Dixon vs. Dodd, 80 Atlantic 2d 282.

* * *

[100] THE COURT: Well, how do you reconcile this, or do you reconcile this with the decision in this Shay case? Certainly I am bound by an opinion of the United States Court of Appeals as against the District of Columbia Court of Appeals.

MR. FRIEDLANDER: My reconciliation, Your Honor, is that in the Shay case they did not have the agreement before the Court and they said it is well settled that the exclusive agent to sell is not entitled to a commission on a sale made by the owner unaided in the absence of an agreement to the contrary. And I believe that is the distinction, Your Honor. Here we have an agreement to the contrary.

THE COURT: Well, it is rather ambiguous: "I also agree to pay said James E. Reid a commission of five per cent in case sale is made during said period."

Very well, proceed.

MR. FRIEDLANDER: Your Honor, that is my position on my opposition to the motion.

I would like, if Your Honor would permit, to make or submit a cross-motion for a directed verdict for the plaintiff on the same basis and no other.

* * *

[105] THE COURT: I am going to direct a verdict for the plaintiff.

What is the amount?

MR. FRIEDLANDER: $3,680, Your Honor.

Our position in the complaint had been that it became due to us on the date of settlement, which was in January of '62.

* * *

[106] THE COURT: You may bring in the jury.

(The jury resumed the jury box.)

OPINION OF THE COURT

THE COURT: On December 16th, 1961, the defendant Harris signed a document reading as follows: "I hereby authorize and give James E. Reid the exclusive right to sell premises known as 2620 P Street for a period of 30 days. Minimum price to be $85,000. Taxes, insurance, rent, et cetera, to be adjusted on date of transfer. I also agree to pay said James E. Reid a commission of five per cent in case sale is made during said period."

This contract was delivered to the plaintiff and the testimony is that he made endeavors to procure a purchaser for the property.

On January 6th, 1962, the defendant entered into a [107] contract with Reginald Chutter and Adriana Chutter, his wife, to sell the property to them for the sum of $75,000. This sale was consummated and deed executed on January 11, 1962.

Thus, within the 30-day period during which the plaintiff was to have an exclusive agency for the sale of the property, the defendant sold the property to someone else.

Plaintiff sues for breach of contract, his damages to be measured by the commission based upon the price involved in the sale to the Chutters.

The rule in this jurisdiction that is applicable to this situation is found in the case of Shay v. Second National Bank of Washington, 76 Apps. D.C. 406, 410, in which the rule is summarized as follows:

"It is well settled that an exclusive agent to sell is not entitled to a commission on a sale made by the owner unaided in the absence of an agreement to the contrary."

The defendant seeks to bring himself within the exception and while not seriously denying the proposition that if the owner of the property had sold the property to someone else during the 30-day period through another broker as his agent, the plaintiff would be entitled to recover.

The defendant claims that in this case he sold the [108] property himself and not through another agent and therefore the plaintiff is not entitled to a commission. The fact is that there was a broker through which the sale to the Chutters was made by the defendant, the broker being H. A. Gill & Son.

The defendant claims that the broker was the agent of the purchaser rather than of the seller and that therefore the owner sold the property unaided and comes within the exception. The uncontradicted facts, however, establish the contrary. The prospective purchaser, who had been a customer of the brokerage firm, indicated to the broker that he was in the market to buy some investment property. The broker had on his list the property involved in this case and he offered it to the purchaser, who indicated a desire to accept and buy the property. A contract then was entered into, signed by H. A. Gill & Son, as well as the Chutters, and Harris, the defendant in this case, as the owner. That contract contains a provision:

"The seller agrees to pay to H. A. Gill & Son, his agent, a commission amounting to five per cent of the sales price."

In other words, the seller not only agreed to pay the broker's commission but also in so many words designated [109] the broker as his agent. He would be estopped from denying the agency.

There is also another point. The listing agreement provides that the defendant agrees to pay said James E. Reid a commission of five per cent in case sale is made during said period. There is no exception made for sale by the owner unaided by a broker. It comprehends a sale of any type, no matter through whose agency.

Going back to the rule as stated by the Court of Appeals that an exclusive agent to sell is not entitled to a commission on a sale made by the owner unaided in the absence of an agreement to the contrary, we find that here there is an agreement to the contrary, namely, that the commission is to be paid in case any sale is made during the period of the listing.

For both these reasons the Court reaches the conclusion that there is no question of fact to be submitted to the jury and that the plaintiff is entitled to recover on the uncontradicted facts as summarized.

Accordingly, the Court will direct a verdict for the plaintiff for the sum of $3,680, being five per cent of the purchase price on the Chutter sale, with interest from January 22nd, 1962.

[110] THE DEPUTY CLERK: Jurors please rise.

Members of the jury, by direction of the Court your verdict in this case is for the plaintiff against the defendant in the amount of $3,680, and that is your verdict so say you each and all.

Be seated.

THE COURT: The Court will direct that interest be added as heretofore stated.

Ladies and gentlemen of the jury, this relieves you of further responsibility in this case and the Court wishes to thank you for the time and the attention that you have given it.

* * *

PLAINTIFF'S EXHIBIT 1

I hereby authorize and give _____ the exclusive right to sell premises known as _____ for a period of _____ days.

Minimum Price to be _____ Dollars. Taxes, insurance, rent, etc., to be adjusted to date of transfer.

I also agree to pay said _____ a commission of _____% in case sale is made during said period.

Owner _____

Address _____ Phone _____

Remarks: _____

REID EXH. NO-3 FOR I.D. 3-8-63

PLAINTIFF'S EXHIBIT

PENCAD - Bayonne, N.J.

CONTRACT

H. A. [illegible] SON
1300 Wisconsin Ave., N.W.
Washington 7, D. C.

PLAINTIFF'S EXHIBIT 4

January 6, 1962

Received from Reginald Chuttor and Adriana J. Chuttor (wife)
a deposit of three thousand five hundred fifty & 00/100 (check) Dollars ($3,550.00)
to be applied as part payment of the purchase of Lot 815 in Square 1262 Block XX with
improvements known as No. 2620 P Street, N.W.
in subdivision Georgetown County XX in District of Columbia,
Maryland-Virginia, including any of the following which may be installed now on the premises; heating equipment, plumbing, lighting fixtures, kitchen range, refrigerator, awnings, screens, storm doors, storm windows, venetian blinds, shades, central air conditioning system, trees and shrubs. In other words, all
Total price of property Seventy-one thousand Dollars ($71,000.00).

The purchaser agrees to pay Thirty-six thousand Dollars ($36,000.00)
cash at the date of conveyance, of which sum this deposit shall be a part.

The purchaser is to assume, ~~give place take title subject to~~, a first deed of trust secured on the premises in the amount of approximatoly thirty-five thousand ~~as per copy chain purchaser~~ Dollars ($35,000.00)
due until paid , 19 , bearing interest at the rate of 5½ per cent
per annum, payable
This contract is contingent upon building being able to pass all 1962 DC codes. All leases are on monthly basis. Property zoned 1 C. Property consists of four apartments and one office or store.

~~The balance of deferred purchase money is to be secured by a deed of trust on said property, to be paid in monthly installments of Dollars (~~
~~or more, including interest at the rate of per cent per annum, each installment when so paid to be applied first to the payment of interest on the amount of principal remaining unpaid and the balance thereof credited to principal.~~

Trustee in all deeds of trust are to be named by the parties secured thereby.

The property is sold free of encumbrances except as aforesaid; title is to be good of record and in fact, subject, however, to covenants, conditions and restrictions of record, if any; otherwise said deposit is to be returned and sale declared off at the option of the purchaser, unless the defects are of such character that they may be remedied by legal action, but the seller and agent are hereby expressly released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such action

JA 60

must be taken by the seller promptly at his own expense, whereupon the time herein specified for full settlement by the purchaser will thereby be extended for the period necessary for such prompt action.

Rents, taxes, water rent, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the date of the transfer. Taxes, general and special, are to be adjusted according to the certificate of taxes issued by the Collector of Taxes, except that assessments for improvements completed prior to the date hereof, whether assessment therefor has been levied or not, shall be paid by the seller or allowance made therefor at the time of transfer.

Examination of title, tax certificate, conveyancing, notary fees, survey where required, State revenue stamps if any, including those for any purchase money trust, and all recording charges, including those for purchase money trust if any, are to be at the cost of the purchaser; provided, however, that if upon examination the title should be found defective the seller hereby agrees to pay the cost of examination of the title and also to pay the agent herein a commission hereinafter provided for just as though the sale had actually been consummated and all the terms of this contract complied with.

Within 15---------- days from the date of acceptance hereof by the owner, or as soon thereafter as a report on the title can be secured if promptly ordered, the seller and purchaser are required and agree to make full settlement in accordance with the terms hereof. If the purchaser shall fail so to do, the deposit herein provided for may be forfeited at the option of the seller, in which event the purchaser shall be relieved from further liability hereunder, or without forfeiting the said deposit the seller may avail himself of any legal or equitable rights which he may have under this contract. In the event of the forfeiture of the deposit, the seller shall allow the agent one-half thereof as compensation for his services to him.

Settlement is to be made at the office of the Title Company searching the title (Realty Title Co) and deposit with the Title Company of the purchase money, the deed of conveyance for execution and such other papers as are required of either party by the terms of this contract shall be considered good and sufficient tender of performance of the terms hereof.

Seller agrees to execute the usual special warranty deed and pay for Federal revenue stamps on deed. Property is sold subject to an existing tenancy as follows: thirty day agreement

Seller agrees to give possession at time of settlement, and in the event he shall fail so to do he shall become and be thereafter a tenant by sufferance of the purchaser and hereby waives all notice to quit, as provided by law. (Strike one of the two foregoing sentences).

The risk of loss or damage to said property by fire or other casualty is assumed by the seller until the deed of conveyance is recorded.

All notices of violations of Municipal or County orders or requirements noted or issued by the legal governing body, or prosecutions in any of the courts having jurisdiction on account thereof against or affecting the property at the date of the settlement of this contract shall be complied with by the seller and the property conveyed free thereof. This provision shall survive the delivery of the deed hereunder.

The seller agrees to pay to H. A. GILL & SON, his agent, a commission amounting to 5 percent of salos price and the Title Company, or the Real Estate Office, through which settlement is made is hereby authorized and directed to make deduction of the aforesaid commission from the proceeds of the sale and to make payment thereof to the said agent. Entire deposit to be held by H.A.Gill & Son until settlement hereunder is made.
(Name of Broker)

The principals to this contract mutually agree that it shall be binding upon their respective heirs, executors, administrators or assigns.

This contract, made in triplicate, when ratified by the seller contains the final and entire agreement between the parties hereto and they shall not be bound by any terms, conditions, statements or representations, oral or written, not herein contained.

H. A. GILL & SON, Agent

By Wallace Gill, Assistant

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale and acknowledge it to be our contract.

Property is to be conveyed in the name of .....

Purchaser.

Adriana F. Chatter

Purchaser.

....., 19 ..

Seller.

P.T.C

JA 61

This contract accepted providing purchase price is raised from 71,000.00 to a price of 73,000.00 Terms to be the same. Present balance of 1st trust is exactly 35,000.00

6 Jan, 1962

[illegible signature]
(Seller)

Raymond F. Chittle

PLAINTIFF'S EXHIBIT 5

RECORDER OF DEEDS
WASHINGTON

THIS IS TO CERTIFY that the pages attached hereto constitute a full, true, and complete copy of DEED RECORDED JANUARY 24, 1962 AT 11:34 A.M. AS INSTRUMENT #02644 IN LIBER 11742 AT FOLIO 71. as the same appears of record in this office.
[Seal]

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of this office to be affixed, this the 11th day of OCTOBER A.D. 1965.

Peter S. Ridley,
Recorder of Deeds, D.C.

By /s/ Columbus W. Kelley
Deputy Recorder of Deeds, D.C.

THIS DEED

Made this 11th day of January in the year 1962 by and between J. Francis Harris, III and wife, Sylvia Suter Harris parties of the first part, and Reginald F. Chutter and wife, Adriana J. Chutter parties of the second part:

WITNESSETH, that for and in consideration of the sum of Ten Dollars ($10.00), receipt whereof is hereby acknowledged, the said party of the first part does grant unto the said parties of the second part, in fee simple, as Tenants in Common the following described land and premises, situtate in the District of Columbia and known and distinguished as Parts of Lots numbered Sixty-three (63) and Sixty-four (64) in Square numbered Ninety-two (92) Holmead's Addition to George-

town, now known as Square numbered Twelve Hundred Sixty-two (1262) in City of Washington, described as follows:

Beginning for the same on the South line of "P" Street 36.86 feet east from the East line of 27th Street (formerly Mill Street) and running thence East on said South line of "P" Street 20.87 feet; thence South 120 feet to the rear line of said Lot numbered Sixty-three (63); thence West on the rear lines of said lots Sixty-three (63) and Sixty-four (64) 20.87 feet to a point due South of the place of beginning, and thence North 120 feet to the place of beginning.

Said property being now known for assessment and taxation purposes as Lot numbered Eight Hundred Fifteen (815) in Square numbered Twelve Hundred Sixty-two (1262).

[$42.60 worth of deed stamps]

TOGETHER with all and singular the ways, easements, rights, privileges and appurtenances to the same belonging or in anywise appertaining, and all the estate, right, title, interest, and claim, either at law or in equity, or otherwise however, of the said party of the first part, of, in, to, or out of the said land and premises.

AND the said parties of the first part covenant that they will warrant specially the property hereby conveyed; and that they will execute such further assurances of said land as may be requisite.

WITNESS their hands and seals the day and year first hereinbefore written.

Witness: /s/ J. Francis Harris, III [Seal]
/s/ Sylvia Suter Harris [Seal]

[Notarial certificate, 11 Jan. 1962]

PLAINTIFF'S EXHIBIT 6

[Front]

12/1/61 19__

I hereby authorize and give ______ the exclusive right to sell premises known as ______

______ for a period of 5 days

Minimum Price to be ______ Dollars. Taxes, Insurance, rent, etc., to be adjusted to date of transfer.

I also agree to pay said ______ a commission of ____% in case sale is made during said period.

Owner [illegible]

Address ______ Phone ______

Remarks: [illegible]

PLAINTIFF'S EXHIBIT

DEFENDANT'S EXHIBIT

[Back]

R. E. SALES LISTING CARD

Location 3020 – "O" St. N.W. Price, $52,500

Building Story Addition Terms

Rooms 1st Fl. 2nd 3rd Per Mo.

Condition Finish

Lot Alley

Paving Sidewalk Curb and Gutter

Sewer Light in St. Light in House

Bath Closet Laundry B's'm't Cellar

Water Heat

Garage Sign

1st Mort. $ Due Int. % Taxes, $

2nd Mort. $ Due Int. %

3rd Mort. $ Due Int. %

Owner Agent

Through

Occupied by { Owner / Vacant Rent, $______ per mo. Due ______ Lease ______ / Tenant

Remarks:

Date

Law Reporter Blank No. 14

The Washington Law Reporter Company
Cafritz Building, Washington 6, D. C.

PLAINTIFF'S EXHIBIT 7

A. GILL & SON
1800 Wisconsin Avenue, N.W.
Washington 7, D.C.

January 8, 1962

Realty Title Insurance Co., Inc.
1424 K Street, N.W.
Washington, D.C.

Gentlemen:

We are authorized, on behalf of Reginald F. Chutter, to order title search on the property at 2620 P Street, N. W., Lot 815 in Square 1262.

The sale price on the property is $73,600.00 and will be all cash above the existing first deed of trust of $35,000.00.

The property is to be conveyed to Reginald F. Chutter and Adriana J. Chutter, as Tenants in Common. Full title insurance policy is to be issued on their behalf. Settlement is to be held within 15 days after January 6, and we would appreciate receiving the preliminary report in duplicate.

Very truly yours,

/s/ N. S. Volckman

P.S. We enclose copy of the contract.

[This page left blank in order most efficiently to accommodate exhibit pages which follow]

DEFENDANTS' EXHIBIT 1 — one of this

SALES CONTRACT — DISTRICT OF COLUMBIA

Law Reporter Blank No. 363

[illegible] Ex 14 NA 6 for ID Rec'd 3-8-63 Deputies [illegible] 11:15

Jerry B Kimble

December 9, 19 61

Received from MINNIE L. KIMBLE and JERRY B. KIMBLE Minnie Kimble

a deposit of FIVE THOUSAND .... and ... no/100 .... Dollars ($ 5,000.00)

to be applied as part payment of the purchase of Lot .... in Square ...., with

improvements thereon known as No. 2620 P St., N. W. .... in the District of

Columbia, upon the following terms of sale: All cash $75,000.00 — See reverse side JBK J.E.K. [illegible]

Total price of property ~~SEVENTY THOUSAND .... 00/100 .... Dollars ($ 70,000.00)~~.

The purchaser agrees to pay the difference between First Deed of Trust to be placed by purchaser and Second Deed of Trust in cash. Dollars ($ ....)

cash at the date of conveyance, of which sum this deposit shall be a part.

The purchaser is to ~~assume/give/place, take title subject to a~~ first deed of trust secured on the premises of 2620 P Street, N. W., in the amount of the highest conventional first trust available. Contract is conditioned upon obtaining written commitment for amt. applied for in application. Commitment to be received on or before December 16, 1961. ~~Dollars ($), due ...., 19 ...., bearing interest at the rate of ...... per cent per annum, payable~~ .... and to secure a Second Deed of Trust as balance of the deferred purchase money mortgage payable at the rate of six per cent (6%) per annum, Ten 00/100 Dollars ($10.00) per thousand per month, principal and interest, unpaid balance to be paid in full five (5) years from date thereof. Purchaser reserves right to make higher payments at any time without penalty.

~~and to be applied first to the payment of interest on the amount of principal remaining unpaid and the balance thereof credited to principal.~~

Trustees in all deeds of trust are to be named by the parties secured thereby.

The property is sold free of encumbrances except as aforesaid; title is to be good of record and in fact, subject, however, to covenants, conditions, and restrictions of record, if any; otherwise said deposit is to be returned and sale declared off at the option of the purchaser unless the defects are of such character that they may readily be remedied by legal action, but the seller and agent are hereby expressly

released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such action must be taken by the seller promptly at his own expense, whereupon the time herein specified for full settlement by the purchaser will thereby be extended for the period necessary for such prompt action.

Rents, taxes, water rent, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the date of the transfer. Taxes, general and special, are to be adjusted according to the certificate of taxes issued by the Collector of Taxes of the District of Columbia, except that assessments for improvements completed prior to the date hereof, whether assessment therefor has been levied or not, shall be paid by the seller or allowance made therefor at the time of transfer.

Examination of title, tax certificate, conveyancing, notary fees and all recording charges, including those for purchase money trust if any, are to be at the cost of the purchaser; provided, however, that if upon examination the title should be found defective the seller hereby agrees to pay the cost of examination of the title and also to pay to the agent herein a commission hereinafter provided for just as though the sale had actually been consummated and all the terms of this contract complied with.

Within [illegible] (3)) days from the date of acceptance hereof by the owner, or as soon thereafter as a report on the title can be secured if promptly ordered, the seller and purchaser are required and agree to make full settlement in accordance with the terms hereof. If the purchaser shall fail so to do, the deposit herein provided for may be forfeited at the option of the seller, in which event the purchaser shall be relieved from further liability hereunder, or without forfeiting the said deposit the seller may avail himself of any legal or equitable rights which he may have under this contract. In the event of the forfeiture of the deposit, the seller shall allow the agent one-half thereof as a compensation for his services to him.

Settlement is to be made at the office of The Columbia Title and Insurance Company
(Name of Broker)

~~[illegible]~~

Seller agrees to give possession at time of settlement, and in the event he shall fail so to do he shall become and be thereafter a tenant by sufferance of the purchaser and hereby waives all notice to quit, as provided by the laws of the District of Columbia. (Strike one of the two foregoing sentences.)

The risk of loss or damage to said property by fire or other casualty until the deed of conveyance is recorded is assumed by the seller.

All notices of violations of Municipal orders or requirements noted or issued by any department of the District of Columbia, or prosecutions in any of the courts of the District of Columbia on account thereof against or affecting the property at the date of the settlement of this contract shall be complied with by the seller and the property conveyed free thereof. This provision shall survive the delivery of the deed hereunder.

The seller agrees to pay to James E. Reid (and cooperating broker)
(Name of Broker)
his agent, a commission amounting to $ THREE THOUSAND EIGHT HUNDRED SEVENTY-FIVE ($3,875.) Dollars and the Title Company, or the Real Estate Office, through which settlement is made is hereby authorized and directed to make deduction of the aforesaid commission from the proceeds of the sale and to make payment thereof to the said agent. Entire deposit to be held by James E. Reid until settlement hereunder is made.
(Name of Broker)

The principals to this contract mutually agree that it shall be binding upon their respective heirs, executors, administrators or assigns.

This contract, made in triplicate, when ratified by the seller contains the final and entire agreement between the parties hereto and they shall not be bound by any terms, conditions, statements or representations, oral or written, not herein contained.

James E. Reid *James E. Reid*
Agent.

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale and acknowledge it to be our contract.

Property is to be conveyed in the name of to be designated

Copies in quadruplicate

[signature] Dec 9, 1961 — *Jerry B Kimble* Jerry B. Kimble, Purchaser.

Dec. 16" 1961 — J. F. Harris, III, Seller.

[signature] — Sylvia Harris, Wife of Seller.

MINNIE L. KIMBLE (Wife of Purchaser)

Sales Contract

REAL ESTATE

BETWEEN

Owner

AND

Purchaser

, 19

This Contract under terms and conditons as stated herein, is accepted providing the purchase price is raised to $77.500.

Dec. 9, 1961
Witness

Dec. 9, 1961
J. F. Harris

The Washington Law Reporter Company
Califts Building, Washington 6, D. C.

I Minnie Kimble and Jerry Kimble my husband do hereby offer the Sum of $7500 all Cash upon the terms and Conditions on the reverse Side.

Jerry B Kimble - Whitakers N.C.
Minnie L. Kimble

All conditions + terms specified purchase
We Minnie Kimble, my [illegible]
husband - do hereby agree
To increase our Purchase
Price - To your asking price
Of 7,500 - Jerry Kimble
Minnie Kimble

Seen + initialed
[illegible] 1-2-64

DEFENDANTS' EXHIBIT 2

MINNIE L. KIMBLE
JERRY B. KIMBLE

No. 231

December 9, 1961 15-55/511

PAY TO THE ORDER OF Reid Realty Company (James E. Reid, Pres) $ 5,000.00

FIVE THOUSAND and ....no/100......... DOLLARS

AMERICAN SECURITY
& TRUST COMPANY
FIFTEENTH STREET & PENNA. AVE. N. W.
WASHINGTON 13 D. C.

Deposit for Purchase of 2620 P St. NW. Wash., D. C.

Minnie L. Kimble
Jerry B. Kimble
(Joint Account).

⑆0511⑈0055⑆ 439 45 922⑈

DEFENDANT'S EXHIBIT

J 34

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 20,150

J. FRANCIS HARRIS, III

Appellant

v.

JAMES E. REID

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FRIEDLANDER & FRIEDLANDER
Mark P. Friedlander
Mark P. Friedlander, Jr.
Blaine P. Friedlander
Harry P. Friedlander
1210 Shoreham Building
806 - 15th Street, N. W.
Washington, D.C. 20005

Attorneys for Appellee

INDEX

TABLE OF CASES

STATUTES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,150

J. FRANCIS HARRIS, III

Appellant

v.

JAMES E. REID

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

SUMMARY OF ARGUMENT

The United States District Court for the District of Columbia had original jurisdiction of this case, in that it was filed at a time when the jurisdictional limitation was $3,000.00.

Section 11-962 of the District of Columbia Code [1961 Edition], Sup. V (1966), did not divest the United States District Court of jurisdiction,

but simply gave the trial Judge discretion to certify cases involving less than $10,000.00 to the District of Columbia Court of General Sessions. The trial Judge was not asked to exercise this discretion in the case before this Court on appeal — nor did he — and in fact could not now exercise such a discretion on remand, as requested by Appellant, because the Code is applicable only to cases "prior to trial." This case has already been tried.

In arguing a point, not seriously raised or considered below, Appellant seeks to pretend that the details surrounding an offer to purchase for an undisclosed principal and through a "straw party" (Kimble) are relevant in the determination of Appellee's contract rights. In doing so Appellant chooses to ignore the fact that the Kimble contract was never more than an offer which was, not only not accepted by Appellant, but was totally ignored by Appellant, and was never a subject matter which affected Appellant's conduct or the listing contract between Appellant and Appellee.

In this appeal Appellant pretends that there were uncontroverted facts in his favor, without explaining a totally different theory and a totally different set of facts originally alleged by him and never altered or amended by pleadings or by his appearance in court to offer testimony.

The uncontroverted facts were those recited by the trial Court in its opinion, and the legal arguments advanced pro and con below were those which were resolved in that opinion, and no argument questioning the Judge's factual determination or legal conclusions is raised in this appeal.

ARGUMENT

I

The United States District Court for the District of Columbia Had Jurisdiction To Hear the Within Cause of Action

Appellant now argues for the first time that the trial Court was required to certify this action to the District of Columbia Court of General Sessions for trial. He explains his right to raise this question for the first time on appeal by claiming that it is a matter of jurisdiction.

The Appellee here suggests that the argument advanced by Appellant under Argument I is totally without merit. The original suit by the Appellee against the Appellant was filed on February 27, 1962 in the District Court. The jurisdiction of the Court was founded upon Section 11-305 (and subsequent sections) of the District of Columbia Code [1961 Edition], and was an action to recover a sum in excess of $3,000,00, the jurisdictional limit at that time (J.A. 1). Appellant filed an answer to the complaint and a counterclaim (J.A. 4). The case was pretried on November 19, 1963 (J.A. 10), and thereafter came on for trial on the complaint and the counterclaim before a jury in the United States District Court. At the conclusion of the trial there was a "hung jury" as to Appellee's original complaint, and a decision favorable to the Appellee on Appellant's counterclaims and against Appellant on his cross-claims against the co-defendants. This left remaining for retrial only Appellee's original complaint (See Statement of the Case, page 2, Appellant's Brief; and it should be noted that the Joint Appendix carries no record of the docket entries for Orders reflecting what had taken place, it being obvious that Appellant did not determine to raise this point until such time as he was preparing his brief. Appellant's Statement of the Case, however, reflecting the prior proceedings, is correct.)

Appellant argues that the new Code Section 11-962, District of Columbia Code [1961 Edition], Sup. V (1966), is the controlling statute which "required" the trial Court to certify the case to the District of Columbia Court of General Sessions. It is respectfully submitted that that very section would have prohibited the transfer had the transfer been requested — which it was not — because that Code section states:

> "In a civil action commenced in the United States District Court for the District of Columbia, other than an action for equitable relief, where it appears to the satisfaction of the court at or subsequent to any pretrial hearing *but prior to trial thereof* that the action will not justify a judgment in excess of $10,000.00, the court *may certify* the action to the District of Columbia Court of General Sessions for trial" [italics supplied].

Obviously the Court was given discretion either to certify or not to certify, and the sole issue for appellate review would be whether or not the District Court wisely exercised its discretion, or whether it had acted arbitrarily and thus had abused its discretion.—*Gray v. Evening Star Newspaper Co.* (1960), 107 U.S. App. D.C. 292, 277 F.2d 91.

Conversely, it is submitted that the very same Code section would have forbidden the trial Court to certify the case to the District of Columbia Court of General Sessions had Appellant made that request or had the Court acted upon its own initiative. The Code section cited above gives a trial court discretion to certify "prior to trial." This case had already been completely tried once, and was — in part — up for retrial; and if Appellant had argued that "prior to trial" means each separate trial, he clearly is now barred from such an argument, in that the case of course has been tried. There is therefore no authority upon which *this* Court could remand the case back to the District Court for certification to the District of Columbia Court of General Sessions.

Thus, the issue raised by Appellant in his Argument I is not jurisdictional. The United States District Court had jurisdiction at the time

the suit was filed and at the time the case was tried, and Section 11-962 of the District of Columbia Code did not take away that jurisdiction.

II

The Appellee Is Not Precluded From His Right to a Commission From the Appellant

Throughout the pleadings and the trials below Appellant has been persistent in his efforts to allege alternate facts often conflicting, claiming as "facts" whatever suits the particular theory being advanced by Appellant at the time.

In the very beginning Appellant denied any obligation to pay the commission, by alleging that the listing agreement — which is the subject matter of the Suit (J.A. 59) — had been altered and was not signed on the 16th of December, 1961, but rather had been signed on the 6th of December, 1961 (see Pretrial Order, J.A. 10-11), and therefore had expired by its terms before the "Chutter contract" had been signed. At that time he did not hesitate to declare his position to be that he had made the "Chutter contract" through Gill, another real estate agent.

Appellant also claimed that Appellee — through the "Kimble contract" — had sought to practice fraud and deceit upon him and that he, the Appellant: "...upon discovering the said fraud and deceit, diligently sought to sell the said property at the highest available price and subsequently sold the said property for $73,600.00 less a sales commission of $3,680.00 paid to a real estate broker who had procured the bona fide purchasers."—(J.A. 12)

Offering evidence — primarily his own testimony — in support of the above position, appellant Harris went to trial. The jury ruled against him on his counterclaims and cross-claims, and could not reach a verdict with respect to the above defenses as applied to Appellee's claim for commission. In that trial the real issue was the claim of an altered date on the listing card.

When the case came up for trial for the second time on the sole question of Appellee's right to commission, Appellant had made no amendments to his pretrial statement, and therefore was still asserting the defenses set forth above. At the second trial — the one here on appeal — the Appellant himself elected not to appear or to testify, and no explanation was offered for his failure to do so. The claim that the date on the listing card had been altered was apparently abandoned; and, ignoring his own claim that he had been defrauded and that, upon "discovery" of the fraud was obliged to rush out and sell his property for the best price he could get through another broker, he proceeded on a theory which involved the assertion of facts which were exactly contrary — that is: That the real estate broker through whom Appellant had secured a purchaser [the Chutter contract] was the agent of Chutter and not the agent of Harris; and thus he, the Appellant, was not obliged to honor the listing agreement with Appellee because he was an owner selling his own property (J.A. 27-28).

The explanation to the trial Court by Appellant's counsel for the inconsistency in the pretrial statement and the presentation, was that the pretrial statement was unartfully drawn (J.A. 28). All of Appellant's evidence went to that point (J.A. 49 et seq.). Having made this explanation, Appellant then proceeded to try the case on the issue of whether or not Gill was Harris's agent and whether or not Harris was entitled to sell his property himself without being obligated under the listing agreement. After having made a change in his position, Appellant failed to offer any evidence to support such new claim — and the Appellant, himself, did not testify.

Appellant's counsel on this appeal asserts a third set of facts. He now claims that facts surrounding an offer to purchase the subject realty are important and controlling, although the fact is that the offer of a contract was not the subject matter of this suit, and said offer never ripened into a contract and was ignored by Appellant when an attempt was made to present it to him.

The evidence, which is not contradicted, was that Appellant had gone about making the "Chutter contract," — not "because" of some alleged misconduct on the part of Appellee — but by entirely ignoring the exclusive listing agreement of Appellee, and the activities of Appellee to secure a purchaser within the listing period.

Reference is made to the testimony by Appellee concerning Appellant's lack of concern about the "Kimble contract," found at Joint Appendix 41, as follows:

> "Q. On that occasion what was said by Mr. Harris about this contract or any other contract?
>
> "A. When I came into his home I told him that I had a contract, and he laughed at me and said that he had already sold the property and he showed me a piece of paper which appeared to be a contract.
>
> "Q. Did you read it?
>
> "A. I did not read the contract which he had. And he refused to discuss the contract which I had in my pocket and I was going to submit to him."

The foregoing testimony is uncontradicted.

Thus all of Appellant's arguments reflecting the details of the "Kimble contract" are shown in their true light — that is, that they had no bearing upon the Appellee's actions and, hence, could not conceivably reflect "conduct" which would have entitled Appellant to terminate the listing or exclude Appellee from his commission.

It should be noted that the Appellant did not and does not claim that there was some question of fact to be submitted to the jury. He only urges that on the cross-motions for directed verdicts it was his motion that should have been granted instead of the motion submitted by Appellee (see docket entry, January 27, 1966, wherein Appellant withdrew his motion for new trial (J.A. 26).

It is thus submitted that the opinion of the trial Judge, found at Joint Appendix 56 through 58, correctly stated the respective positions of the parties and the application of the law to the uncontradicted facts; and neither the recitation of uncontradicted facts set forth by the trial Judge in his opinion, nor the trial Court's declaration and application of the law, are challenged in this appeal by Appellant.

CONCLUSION

It is respectfully submitted that the judgment in favor of the Appellee should be affirmed.

FRIEDLANDER & FRIEDLANDER
Mark P. Friedlander
Mark P. Friedlander, Jr.
Blaine P. Friedlander
Harry P. Friedlander
1210 Shoreham Building
806 - 15th Street, N. W.
Washington, D.C. 20005

Attorneys for Appellee